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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 532

PATRICIA ROGERS, *et al.*,

Petitioners,

—v.—

DR. EDGAR F. PAUL, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND MOTION TO ADD ADDITIONAL PARTY PLAINTIFFS

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PATRICIA ROGERS, *et al.*,

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DR. EDGAR F. PAUL, *et al.*

I

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND MOTION TO ADD ADDITIONAL PARTY PLAINTIFFS

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit entered in the above-entitled cause on May 7, 1965, and that this Court grant petitioners' motion to add additional party plaintiffs.

Citations to Opinions Below

The opinion of the District Court (R. 43), printed in the Appendix hereto, *infra,* p. 1a, is reported in 232 F. Supp. 833. The opinion of the Court of Appeals (R. 44), printed in the Appendix hereto, *infra,* p. 29a, is reported in 345 F. 2d 117.

Jurisdiction

The judgment of the Court of Appeals was entered on May 7, 1965 (p. 49a, *infra*). Mr. Justice White, on July 30, 1965, extended the time for filing the petition for certiorari until September 4, 1965. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

The following questions are now posed for resolution by this Court:

1. Whether the Board's grade-a-year desegregation plan can be sustained under *Brown* v. *Board of Education,* in the absence of valid administrative problems justifying delay of complete desegregation until 1968, where such delay condemns petitioners and all other Negro pupils now in high school to complete their public school education in a segregated school, clearly inferior to high schools to which all white pupils are assigned?

2. Whether petitioners have standing to seek and should be afforded relief now requiring the school board to cease assignment of teachers on the basis of race?

Constitutional Provision Involved

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States.

Statement of the Case

Petitioner, Mrs. Corine Rogers, filed this action to desegregate the public schools in Fort Smith, Arkansas, in September 1963 (R. 1), after unsuccessfully attempting to obtain transfer of her two minor daughters, Patricia and Janice, from the Negro Lincoln High School to the white Northside High School (R. 7).[1]

Negro parents whose children now constitute less than ten percent (R. 65) of the 14,000 students (R. 57) presently attending the system's 30 schools (R. 54) began efforts to desegregate the Fort Smith schools in 1954 immediately after this Court's decision in *Brown* v. *Board of Education* (R. 75). The Board promised citizens that they would study the matter (R. 76). The following year, after the second *Brown* decision, the local NAACP again petitioned the Board for a meeting to discuss school desegregation, and as a result, several meetings were held (R. 76).

In September 1957, the Board placed into effect a grade-a-year desegregation plan adopted the year before (R. 12), providing for the enrollment of first grade children each year without regard to race or color. Thus, Negro children entering the first grade in the Fall of 1957 were permitted to enroll in a white school, but only if they resided in the attendance area or zone served by the white school (R. 49).

---

[1] Janice Rogers graduated from the Lincoln School after this suit was filed (R. 110). Patricia Rogers, however, is enrolled in the twelfth grade at the Lincoln School, and a motion filed with this petition, p. 35, *infra*, seeks to add as minor petitioners in this case, Vera Moore and Karen Jones, both of whom are now enrolled in Lincoln High School. Thus, this case presents issues uncomplicated by problems of mootness. Moreover, the questions presented are of general public importance. See *United States* v. *Parke, Davis & Co.*, 365 U. S. 125; *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290, 308-10.

Where assignment would place the child in a school where the majority of pupils were of another race, a provision of the plan permitted transfer to a school where a majority of the pupils were of the child's race (R. 22).

By June 1963, when petitioner, Mrs. Rogers, requested transfer for her daughters (R. 7), both were in high school and the Board's plan had reached only grade six. The transfer applications were denied (R. 12), leading to this action for injunctive relief: to require their immediate admission to the Northside School, and to require the immediate desegregation of the school system, including assignment of pupils and faculty on a nonracial basis and the elimination of racial considerations from budgets and all other school programs (R. 2, 8-10).

During the first seven years of the plan's operation, only 121 Negroes and 110 white first grade pupils resided in attendance areas enabling them to enter school on a desegregated basis (R. 24-29, 51-52). Eighty-five Negro and all 110 white pupils chose to attend segregated schools (R. 29). No desegregated assignments were permitted above the grades reached by the plan, even though Negroes have made requests for such assignments (R. 78-79). The plan, moreover, fails to indicate how Negro pupils residing in white attendance areas but enrolled in Negro schools for grade one could later be assigned to white schools. As a result, only about 37 Negroes were attending three white schools under this plan as of the end of the 1963-64 school year, and no white children were enrolled in the system's four Negro schools (R. 28-29, 50).

In the Answer, the Board referred to its 1957 plan, arguing its validity under *Brown* v. *Board of Education,* 349 U. S. 294 (R. 13), its efficiency in permitting desegregation

while promoting "harmonious and peaceful relationships between all pupils and patrons" of the School District (R. 14), and its necessity for solving "administrative problems of various natures" peculiar to the remaining segregated grades (R. 14-15).

Following a pre-trial conference in June 1964 at which the Board was ordered to prepare a revised desegregation plan eliminating the racial minority transfer provisions (R. 30), the Board in July 1964, filed a plan which maintained the grade-a-year pace (R. 31-35).[2]

During the 1964-65 school year, some 197 seventh and eighth grade pupils at the Negro Lincoln School were assigned to white junior high schools (R. 39) under the revised plan. Lincoln High School will serve only grades 10, 11, 12 beginning with the 1965-66 school year by which time grade-a-year desegregation would be in its ninth year (R. 39-40, 56). Petitioners objected to the Board's plan contending: (a) desegregation was not proceeding with all deliberate speed, (b) the plan would not benefit Patricia Rogers, then in the eleventh grade, (c) retention of the minority transfer provision is unconstitutional, (d) the

[2] On June 13, 1964, following the Supreme Court's decision in *Goss* v. *Board of Education*, 373 U. S. 683, the Board amended its Answer, summarizing the transfers granted under the minority racial transfer feature of their plan, and offering to eliminate this provision (R. 24-29). However, the revised plan provided a one year extension of the minority transfer plan at the elementary school level as to white pupils who otherwise would have been assigned to one of three Negro elementary schools (R. 53-58). The Board defended the extension by asserting that assigning 55 white pupils to the Howard Elementary School with 530 Negro pupils, 22 white pupils to Dunbar Elementary School with 60 Negro pupils, and 30 white pupils to Washington Elementary School with 70 Negro pupils would result in "an intense psychological impact" on the white pupils (R. 36-37, 59-63), would adversely affect the good racial relationships in the community, and would cause many white children to enter private schools.

Lincoln attendance area will be based solely on race, and (e) no provision is made for desegregation of teaching personnel (R. 41-42).

At the hearing in August 1964, the Board offered testimony in support of its revised plan, emphasizing that for the 1964-65 school year some 300 Negro pupils would be assigned to white schools (R. 64), but refused to explain exactly what administrative problems would prevent immediate desegregation of grades 9-12, and particularly what problems justified the Board's denial of applications for transfer filed by minor plaintiffs and a few other Negro high school students (R. 78-79).

Having ascertained from the Board Superintendent that only three Negroes had applied for transfer from the Lincoln High School, and since the Record was silent as to why such transfers had been denied, petitioners' attorney asked the Superintendent:

> "Q. So at most, roughly you would have three Negroes who would desire to transfer from the Negro high school to the white high school. Is that correct? A. That is all that has asked to as I remember.
>
> "Q. I would like for you to tell this Court now how three Negroes could disrupt or destroy your educational system. A. Judge, do I have to try to elaborate on that?
>
> The Court: No, I think that is a question for the Court. You have covered it. If you desire you can elaborate some on it, yes.
>
> "A. Your Honor, I prefer not to try to discuss it any further than I have.
>
> The Court: All right.

"Q. Then you refuse to answer the question? A. You haven't asked a question. You have asked an opinion.

"Q. You have been giving opinions here all morning. The attorneys asked you. A. I have already given you that opinion.

"Q. And you refuse to answer the question?

The Court: I am going to hold that he has sufficiently answered it."

Minor petitioner Patricia Rogers was not at all reticent in explaining why she wanted a transfer to the Northside High School.

"Q. I would like for you to tell His Honor in your own words just why you would like to attend the Northside High School. A. I would like to attend because today Negroes are competing not only against Negroes for job opportunities but also against whites, and I think with the integrated education I will have a lot better opportunity for these jobs than I would just going to a Negro high school."

In addition to desiring a desegregated education, minor petitioner Patricia Rogers informed the Board that she would like to study journalism, music and German. None of these courses are available at Lincoln (R. 112-13). All are offered at the two white high schools (R. 122). The Superintendent testified that petitioner's course requests were no basis for transfer because white students cannot transfer from one high school to the other to obtain wanted courses (R. 99, 100); but a review of the catalogue shows that most basic courses are offered at both white schools.[3]

[3] Southside High School is teaching only grades nine through eleven during the 1964-65 school year (R. 39), explaining why some Northside courses were not offered during that year.

In fact, the two white high schools are far larger and offer a wider and more varied choice of subjects than are provided Negroes at Lincoln High School (Pltfs' Exhs. 2, 3, R. 122-24). There are less than 200 Negroes at Lincoln's Senior High (R. 107), while Northside has 2,300 and Southside has 1,000 (R. 96). White high school students are provided with a 25 page printed "Course Catalogue" listing 142 courses in 12 subject matter areas and detailed information on grading, testing, college requirements, suggested programs and school policies and regulations (Pltfs' Exh. 2, R. 122). Negro students at Lincoln get a "Teachers and Students Handbook," consisting of one mimeographed page listing approximately 35 courses in three divisions (Pltfs' Exh. 3, R. 124).

While the Board maintains that it has desegregated grades one through eight under its plan, Negroes are attending only five of 27 white schools (R. 25-28, 126). All schools are still listed for administrative purposes as "White" and "Negro" (Pltfs' Exh. 8, R. 126). As attendance areas are now drawn, it appears that such official designation by race will remain substantially accurate in fact in the future, particularly at the elementary school level (R. 25-29).

In addition, the Board has taken no steps to integrate Negro and white teachers, although all teachers have met together for several years (R. 76). The Board objected to allegations of teacher segregation (R. 11, 84), contending petitioners lack standing to raise the teacher issue. The district court agreed, sustained objection (R. 85, 117), to petitioners' efforts to require assignment of teachers on a nonracial basis, and approved the Board's Revised Plan as submitted, *Rogers* v. *Paul*, 232 F. Supp. 833 (W. D.

Ark. 1964). Reviewing the plan in light of school decisions by the Supreme Court and various federal courts of appeal, the trial court concluded without further elaboration that the plan met the standards of the cases cited. Thus, while referring to the decision in *Goss* v. *Board of Education*, 373 U. S. 683, as the basis for its order of June 18, 1964, invalidating the minority transfer provision in the Board's plan, the lower court concluded from the number of pupils utilizing the provision: "It seems clear that the great majority of pupils, white and Negro, do not desire to attend an integrated school." 232 F. Supp. at 838. The court indicated no other reason for its approval of the extension of the provision for use by white elementary school children during the 1964-65 school year.

In dismissing petitioners' argument that the Board plan does not meet current standards for good faith and all deliberate speed, the court referred to those portions of *Brown* v. *Board of Education*, permitting time to solve administrative problems, but interpreted the Court's subsequent statements in *Watson* v. *City of Memphis*, 373 U. S. 526, as relevant only to desegregation in recreational facilities, 232 F. Supp. at 841. Because the court deemed the Board's desegregation efforts "diligent" and the plan "eminently successful and satisfactory," petitioners' motion for counsel fees (R. 119) was denied. The court then retained jurisdiction as to the teacher issue "if presented by proper parties," and dismissed the complaint. 232 F. Supp. at 844. The court entered judgment based on the above opinion on August 19, 1964 (R. 44), and petitioners filed notice of appeal on the same date (R. 45).

The Eighth Circuit affirmed the district court on May 7, 1965 (345 F. 2d 117), agreeing that the plan is satisfactory as to speed and completeness, and the Board's refusal to

immediately complete desegregation was justified by its fear such action "would needlessly thwart the good faith efforts of the Board to accomplish de jure desegregation in a peaceful and orderly manner." 345 F. 2d at 122.

The Eighth Circuit reviewed several cases from four circuits condemning grade-a-year desegregation plans, and distinguished them on the basis that they involved areas where school boards had failed to act in good faith. Unlike areas where there was hard core opposition to integration, the Court found that the transition in Fort Smith was smooth, without incident, and that the record presented impressive evidence that ". . . both races are satisfied with the revised plan." 345 F. 2d at 123.

The Court found that the record provided no basis for ordering the immediate admission of petitioner Patricia Rogers to the Northside High School because both the Negro and white schools are accredited and courses are provided at each school upon request of at least six students if a teacher can be found to teach it. Cases where individual petitioners were permitted to transfer to desegregated schools in order to obtain courses not otherwise available to them were distinguished as arising in districts where geographical school zoning had not been adopted. Since Patricia Rogers lives within three blocks of the Lincoln High School, the Court found that a transfer would constitute discriminatory action in her favor and would weaken the school system.

In regard to teacher desegregation, the Eighth Circuit interpreted the district court's action, not as requiring a teacher to raise the question, but as requiring that it be raised by a pupil then eligible to attend a desegregated school.

Reason for Granting the Writ

The approval by the courts below of a grade-a-year desegregation plan despite the absence of valid administrative problems justifying delay of complete desegregation for four more years, and the inability of petitioners and other Negro high school students to obtain an education in the Negro high school equal (in respects other than segregation per se) to that provided for white high school students, presents the question of this Court's "all deliberate speed" standard today.

The Fort Smith plan has condemned both original minor plaintiffs to complete their public school education in an inferior segregated school. Two additional Negro high school students, Vera Moore in the 10th grade and Karen Jones in the 11th grade, seek to join as petitioners in this Court, but because the Board's grade-a-year plan extends only to grade nine during the 1965-66 school year, these petitioners too will be denied the benefits of a high quality desegregated education, as will all other Negro pupils now in grades ten, eleven and twelve.

At a time when other courts of appeal are constricting the time in which Southern school boards must extend the desegregation process to all grades, the Eighth Circuit, by approving the Fort Smith plan, unduly prolongs the existence of a small, segregated and educationally inefficient Negro high school, and ironically, shackles petitioners and their class with a slower desegregation pace than would have been required by the United States Department of Health, Education and Welfare for Board compliance with the 1964 Civil Rights Act if judicial relief to desegregate the schools had not been sought.

The Department considers itself bound by court-approved plans. Moreover, to the extent that the Department follows the lead of the court, the Eighth Circuit has set a standard calculated to encourage slowness not speed. And apart from the effect on H. E. W. standards, this decision of course will be important for those districts that choose to forego federal funds. Only the courts can desegregate them.

This case also presents the issue of faculty desegregation, and whether a school board may delay it until pupil desegregation is completed or teachers themselves intervene seeking assignment on a non-racial basis.

Similar issues are presented in petitions for writs of certiorari filed in *Bradley* v. *The School Board of the City of Richmond, Va.*, No. 415 (Oct. Term, 1965), and *Gilliam* v. *School Board of the City of Hopewell, Va.*, No. 416 (Oct. Term, 1965).

1.

The Fort Smith Plan Unreasonably Delays Pupil Desegregation and Condemns Negro Children to Attend Inferior Schools.

A. The Court of Appeals has approved a pace of desegregation in conflict with standards established by this Court and the other circuits.

In several significant respects as set forth in the following paragraphs, the decision below conflicts with decisions of this Court in *Calhoun* v. *Latimer*, 377 U. S. 263; *Griffin* v. *School Board of Prince Edward County*, 377 U. S. 218; *Goss* v. *Board of Education of City of Knoxville*, 373 U. S. 683, and with the Third Circuit in *Evans* v. *Ennis*, 281 F. 2d 385 (3d Cir. 1960), the Fourth Circuit in *Jackson* v.

School Board of the City of Lynchburg, 321 F. 2d 230 (4th Cir. 1963), the Fifth Circuit in *Price* v. *Denison Independent School District,* —— F. 2d —— (5th Cir. No. 21632, July 2, 1965), and the Sixth Circuit in *Goss* v. *Board of Education of City of Knoxville,* 301 F. 2d 164 (6th Cir. 1962) and *Northcross* v. *Board of Education of City of Memphis,* 333 F. 2d 661 (6th Cir. 1964).

The basic error in the lower court decision is traceable to an interpretation of this Court's "all deliberate speed" standard placing emphasis on accommodation to opposition rather than whether change took place as speedily as bona fide administrative considerations would permit. The court of appeals approved the district court finding that the Board's plan had not upset the " . . . exceptionally harmonious and cooperating relationship between the races in Fort Smith, Arkansas" (345 F. 2d at 122). The Court found that unlike areas such as Prince Edward County, Virginia, where integration efforts met with hard core opposition,

> In Fort Smith the transition was smooth and without incident. There was no manifestation of bad feeling or violent opposition. The lack of any evidence to indicate any serious objection to the plan of desegregation is impressive. So far as this record is concerned, both races are satisfied with the revised plan. It has been accepted by the majority of pupils and parents as the best method of complying in good faith with the law (345 F. 2d at 123).

This Court's decisions, of course, leave no doubt that regardless of community opposition, compliance is required "at the earliest practicable date". *Brown* v. *Board of Education,* 349 U. S. 294; *Cooper* v. *Aaron,* 358 U. S. 1. Reviewing the intransigence of Prince Edward County, this Court

nevertheless concluded: "The time for mere 'deliberate speed' has run out, . . . " *Griffin* v. *School Board of Prince Edward County,* 377 U. S. 218, 234. And as for the maintenance of existing and commendable good-will between the races, this Court observed in *Watson* v. *City of Memphis,* 373 U. S. 526, 537, that such conditions "can best be preserved and extended by the observance and protection, not the denial, of the basic constitutional rights here asserted."

But despite these decisions and the more stringent limitations on delay imposed in *Goss* v. *Board of Education,* 373 U. S. 683, and *Calhoun* v. *Latimer,* 377 U. S. 263, the court below, based on testimony that white pupils would suffer "an intense psychological impact" (R. 37) if required to attend Negro schools, approved both the grade-a-year pace and an extension of a minority transfer provision similar to one invalidated in *Goss* v. *Board of Education, supra.* In the Superintendent's view:

> Anything of this nature, that is as big a shock as this would be, in my opinion, to the children, and their parents, the discussions that would take place on the phones, would affect the whole community. It would affect the working relationship, in my opinion, of the staff, the School Board, the patrons, and would only result in difficulty for the smooth operation of the whole school system, not just the schools involved" (R. 63).[4]

The Superintendent testified that the Board was grappling with problems related to: "school population growth and inadequacy of buildings and other facilities", "mass shifting within the District of school population from the

[4] But compare with Record at 71-73, 113.

older sections of Fort Smith to new suburban areas", a huge building program; and "the transition of all schools into a 6-3-3 system (R. 53-58). The Eighth Circuit considered this testimony as evidence that such administrative problems precluded acceleration of the plan's grade-a-year speed. But there was no testimony as to how these factors related to the time required for school desegregation, or more specifically, how they would complicate or prevent immediate desegregation of the Fort Smith high schools (see R. 56-57).

The lower court's second basic error is in the misplaced importance and distorted effect given to findings concerning the Board's good faith progress under the plan. It need hardly be repeated that school officials may not assert good faith as a legal excuse for delay. *Cooper* v. *Aaron, supra,* at 15. Only recently the Fifth Circuit in requiring rapid acceleration of a grade-a-year plan initiated prior to the filing of a law suit, observed that a school board's good faith desire to do what the law requires is significant:

> But in the final analysis it has limited bearing on the substantive rights accorded and specifically the speed of the plan. The rights of Negro children come from the Constitution, not the attitude, good or bad, of school administrators. *Price* v. *Denison Independent School District,* —— F. 2d —— (5th Cir. No. 21632, July 2, 1965).

The Eighth Circuit had seemed to adopt a similar view in *Dove* v. *Parham,* 282 F. 2d 256, 261 (8th Cir. 1960) where good faith was measured objectively by "required action" not "state of mind." Accord, *Norwood* v. *Tucker,* 287 F. 2d 798, 804 (8th Cir. 1961). And it was the Eighth Circuit which seven years ago stood firm in the face of determined resistance by state and local governments to desegregation efforts in Little Rock. *Aaron* v. *Cooper,* 257 F. 2d 33, 40

(8th Cir. 1958), affd. *Cooper* v. *Aaron,* 358 U. S. 1. See also *Brewer* v. *Hoxie School District No. 46,* 238 F. 2d 91 (8th Cir. 1956).

Clearly, the Eighth Circuit's departure from standards set by this Court and followed by the other courts of appeal which have rejected grade-a-year plans may not be concealed by the claim that such cases involve " . . . situations where the school boards had either failed to act in good faith or after inordinate delays had proposed a plan which was too slow and unduly protracted the process of desegregation" 345 F. 2d at 122. For example, the Fifth Circuit in the *Price* case *supra,* accelerated a grade-a-year plan produced in good faith and without inordinate delay. On the other hand, here the Board's plan was initiated in 1957, but its rate of progress until, at least, this suit was filed could accurately be described as "slow and unduly protracted."

As indicated above, no specific reasons were provided why three years will be required to desegregate the one Negro high school, Lincoln, with only about 200 students in grades ten to twelve (R. 107). Nor was there an explanation why school budgets and records continue to be maintained on a racial basis (R. 126), or indeed why the Board refuses, short of a suit by a teacher, to desegregate its teacher hiring and assignment procedures (R. 11, 84). But whatever the reasons, the Eighth Circuit's position, clearly contrary to the decisions of this Court and the other courts of appeal, perpetuates the denial of constitutional rights to petitioner and her class resulting in sacrifices far more severe than envisioned as necessary in the "all deliberate speed" standard.

B. In view of the grossly inferior education it provides, the Lincoln School should have been desegregated immediately.

The Eighth Circuit stands alone in its willingness to delay desegregation when such delay condemns petitioner and all other Negro high school students to attend the undeniably inferior Lincoln High School. The court below points to Lincoln's accredited status as proof of equality without mentioning that such accreditation is based on a separate philosophy designed to meet opportunities that may be available to Negro graduates (R. 89-90). Accreditation however, connotes merely that the school meets the minimum standards of the accrediting agency, and cannot obscure the fact that the Lincoln School's curriculum is woefully lacking when compared to that provided students attending the white high schools.

Petitioner Patricia Rogers' expressed belief that an integrated education would better prepare her for job opportunities (R. 112) carries more than sociological and psychological implications when applied to Fort Smith's high school facilities. Patricia Rogers specifically supplemented her desire for a desegregated education, by requesting instruction in journalism, music, and German (R. 112), none of which are available at Lincoln High (R. 124). White students attending Northside High School can enroll in Journalism I, II, III, and IV, as well as 10 different English courses (4 are offered at Lincoln). In music, white students are offered Music Theory, three band and four choral classes while Negroes may take "Band" or "Glee Club" in lieu of physical education. Four years of German are available at Northside as well as four years of Latin, French and Spanish. Negroes are offered two years of French.

Beyond the subjects in which Patricia Rogers was specifically interested, a plethora of courses designed to prepare students for meaningful participation in today's world are offered in the white high schools. The courses, illustratively listed in a 25 page printed handbook, include and range from family living, driver education, library science, mechanical and architectural drawing, trade printing, metal work, home management, accounting, office machines to college preparatory chemistry, physics, algebra and mathematics. These are but a few of the more than 140 courses offered in the white high schools in twelve subject matter areas. Negro students at Lincoln High School are offered none of these courses, and must select in their one page mimeographed "handbook" from about 35 course offerings in three subject matter areas.[5]

Based solely on a summary comparison of the offerings at the two high school systems, it is obvious that sound scholastic and constitutional basis exist under *Brown* v. *Board of Education, supra,* and probably even the rejected "separate but equal" standard of *Plessy* v. *Ferguson,* 163

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[5] The lower court's quotation of figures shows that per pupil costs for Negro high school pupils are higher than those for white students. This points up the difficulty of maintaining a first class high school with only 200 students, far below the number experts consider feasible for an efficient and effective high school. Thus, Dr. James B. Conant has written:

> The enrollment of many American public high schools is too small to allow a diversified curriculum except at exorbitant expenses. . . . The prevalence of such high schools—those with graduating classes of less than one hundred students—constitutes one of the serious obstacles to good secondary education throughout most of the United States. I believe such schools are not in a position to provide a satisfactory education for any group of their students—the academically talented, the vocationally oriented, or the slow reader. The instructional program is neither sufficiently broad nor sufficiently challenging. A small high school cannot by its very

U. S. 537 for requiring the immediate desegregation of grades ten thorugh twelve at the Lincoln School.

Indeed, even prior to the decision in *Brown* v. *Board of Education*, this Court in *Missouri ex. rel. Gaines* v. *Canada*, 305 U. S. 337; *Sipuel* v. *Oklahoma*, 332 U. S. 631, and *Sweatt* v. *Painter*, 339 U. S. 629, held that disparity in educational facilities required immediate desegregation.[5] Moreover, at the elementary and high school level, the Supreme Court of Delaware in *Gebhart* v. *Belton*, 91 A. 2d 137 (Del. 1952), held that measurable disparity in facilities requires immediate integration.[6]

Following *Brown*, a number of federal courts have required immediate school desegregation on a finding of inequality of facilities. Recently, the Fifth Circuit acting on a motion for an injunction pending appeal, required the immediate admission of a Negro student to summer sessions at a white school in order to obtain Algebra courses not available at the Negro school. Relief was granted notwithstanding that the appellant was not eligible to attend a desegregated grade. *Acree* v. *County Board of Education of Richmond County, Georgia*, —— F. 2d —— (5th Cir., No. 22,723, June 30, 1965). See also, *Gaines* v. *Dougherty County Board of Education*, 329 F. 2d 823 (5th Cir. 1964).

The Sixth Circuit in approving a stair-step school desegregation plan has denied specific relief to named plaintiffs who were not eligible for transfer under the plan, *Goss*

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nature offer a comprehensive curriculum. Furthermore, such a school uses uneconomically the time and efforts of administrators, teachers, and specialists, the shortage of whom is a serious national problem. Conant, James B., *The American High School Today*, pp. 37, 77, McGraw-Hill, New York (1959).

[6] Affirmed *sub nom.*, *Brown* v. *Board of Education*, 347 U. S. 483.

v. *Board of Education of Knoxville*, 301 F. 2d 164, 168 (6th Cir. 1962), but granted relief where a Negro student sought a commercial art course not available in Negro schools. *Goss* v. *Board of Education of Knoxville*, 305 F. 2d 523 (6th Cir. 1962).

For similar reasons, courts in the Fourth Circuit both prior and after *Brown* have required the immediate desegregation of public schools where Negro pupils were required to leave the school district to attend school, *Buckner* v. *County School Board of Greene County*, 332 F. 2d 452 (4th Cir. 1964); *Goins* v. *County School Board of Grayson County*, 186 F. Supp. 753 (W. D. Va., 1960), stay denied 282 F. 2d 343 (4th Cir. 1960); *School Board of Warren County* v. *Kilby*, 259 F. 2d 497 (4th Cir. 1958); *Corbin* v. *County School Board of Pulaski County*, 177 F. 2d 924, 927 (4th Cir. 1949); *Griffith* v. *Board of Education of Yancey County*, 186 F. Supp. 511 (W. D. N. C., 1960); *Walker* v. *County School Board of Floyd County, Va.* (W. D. Va., 1960, C. A. No. 1012), 5 Race Rel. L. Rep. 714; *Crisp* v. *County School Board of Pulaski County, Va.* (W. D. Va., 1960, No. 1052), 5 Race Rel. L. Rep. 721.

Thus, even assuming the presence of valid factors mitigating against the immediate desegregation of grades ten through twelve, it appears that only the Eighth Circuit would refuse Negro students the right to immediate admission to white schools to obtain courses not available at Lincoln High. Petitioners' right to such admission is in no way diminished by the Superintendent's offer to provide any course at any high school "if there are as many as six students that want the course and we can find a teacher to teach it" (R. 89).[7] As this Court indicated in *Missouri ex*

[7] While teacher segregation will be discussed below, its continued presence in the Fort Smith system adversely affects the likelihood

rel. Gaines v. *Canada*, 305 U. S. 337, 351, constitutional rights cannot be made to depend upon the number of persons who may be discriminated against.

C. The lower court's decision frustrates enforcement of school desegregation as required by the Civil Rights Act of 1964.

The Civil Rights Act of 1964 represents a Congressional effort to implement this Court's decision in the *Brown* case, by forbidding in Title VI of its provisions the disbursement of federal funds to facilities (including schools) which discriminate on the basis of race or color.[8] Acting pursuant to the authority of Title VI, the United States Department of Health, Education and Welfare (H. E. W.) and its Office of Education has prepared standards for school boards seeking to desegregate their systems.[9] Under the standards contained in its "General Policy Statement," school boards making the transition from biracial to desegregated systems must as a minimum for the 1965-66 school year, take several affirmative steps including desegregation of all grades if possible, but no less than four grades, including "the first and last high school grades," desegregate all grades by the 1967-68 school year, permit any pupil assigned to a segregated school to transfer, irrespective of whether the grade he is attending has been desegregated, " . . . to take a course of study for which he is qualified and

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that the superintendent will be able to fulfill his offer at the Lincoln High School.

[8] 42 U. S. C. §2000d.

[9] General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools, HEW, Office of Education, April 1964. The document, hereinafter cited as "H. E. W. Guidelines" is reprinted in the appendix to *Price* v. *Denison Independent School District*, —— F. 2d —— (5th Cir. No. 21632, July 2, 1965), and in Southern School News, May 1965, pp. 8-9.

which is not available in the school he is attending;" (H. E. W. Guidelines, V, E 1, 4).[10]

Unfortunately for petitioners and their class, the regulations under which Title VI of the Civil Rights Act of 1964 are administered,[11] and the H. E. W. Guidelines based on these regulations, *supra*, provide that school boards are eligible for financial assistance if they are subject to a final court order of desegregation. As presently interpreted, this provision applies even though the court order provides for more limited desegregation than the H. E. W. Guidelines. Thus, approval by the court below of the Board's grade-a-year plan, enables the Board to continue receiving federal funds and places petitioners in a position worse than if this suit had not been filed.[12] The order of the court below was accepted as the Fort Smith plan by the Office of Education on July 19, 1965.

Precisely to avoid such paradoxical results, the Fifth Circuit, recognizing the United States Office of Education as better qualified and "the more appropriate federal body to

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[10] As of August 24, 1965, the Office of Education reported that they have accepted desegregation plans from 113 Arkansas school boards, 68 of which provide for desegregation in all 12 grades in the Fall of 1965. Ten school boards will desegregate all 12 grades by the Fall of 1966 and 35 will complete desegregation in 1967. An additional 80 Arkansas Boards have submitted plans which are pending approval in the Office of Education.

[11] 45A C. F. R. §80(c) (December 4, 1964).

[12] Unhappily, petitioners are not alone. District courts in the Eighth Circuit have recently approved desegregation plans in El Dorado, Arkansas, *Kemp* v. *Beasley*, Civ. No. 4-65-C-8 (E. D. Ark.), and West Memphis, Arkansas, *Yarbrough* v. *Hulbert-West Memphis Sch. District No. 4* Civ. No. 1048 (W. D. Ark.), both of which plans limit desegregation to two grades in 1965 and in a variety of other respects, fall short of meeting the minimum standards contained in the H. E. W. Guidelines. The Office of Education reports that both court orders have been accepted, assuring the continued flow of federal funds to these school districts.

weigh administrative difficulties inherent in school desegregation plans," rejected a grade-a-year plan in *Singleton* v. *Jackson Municipal Separate School District*, —— F. 2d —— (5th Cir., No. 22527, June 22, 1965), and by injunction pending appeal ordered the district court to conform the plan to the minimum standards fixed by the United States Office of Education. This policy, the court said, was intended to prevent school boards from using federal courts as a means of circumventing requirements for financial aid.[13] "If judicial standards are lower," predicted the Fifth Circuit in *Singleton, supra*, "recalcitrant school boards in effect will receive a premium for recalcitrance; the more the intransigence, the bigger the bonus."

The restricting effect the lower court's decision has had on school desegregation thus not only denies petitioners' constitutional rights, but also creates standards which handicap uniform enforcement of Title VI of the 1964 Civil Rights Act. It now appears that many Boards will waive all federal aid rather than comply with the Civil Rights Act (see N. Y. Times, Aug. 29, 1965, p. 52, Aug. 31, 1965, pp. 1, 42). The lower court's decision encourages such recalcitrant systems to maintain segregation until suits are filed and the more lenient judicial standards are invoked.

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[13] The Fifth Circuit has followed its decision in the *Singleton* case in *Price* v. *Denison Independent School District, supra*, and by injunction pending appeal in *United States* v. *Jefferson County Board of Education*, —— F. 2d —— (5th Cir. No. 22864, Aug. 17, 1965); *United States* v. *City of Bessemer Board of Education*, —— F. 2d —— (5th Cir. No. 22862, Aug. 17, 1965); *United States* v. *Bossier Parish School Board*, —— F. 2d —— (5th Cir. No. 22863, Aug. 17, 1965); and *Valley* v. *Rapides Parish School Board*, —— F. 2d —— (5th Cir. No. 22832, Aug. 19, 1965).

2.

Petitioners' Constitutional Right to a Desegregated Education Includes, of Necessity, Instruction by Teachers Assigned Without Regard to Race.

During the decade since *Brown* v. *Board of Education,* 347 U. S. 483, 349 U. S. 294, the principles established in those cases have been interpreted to prohibit all racial discrimination by states.[14] Petitioners submit it is time to direct immediate implementation of their right to attend schools where teachers and other faculty personnel are assigned on a non-racial basis. Such relief is closely linked to the requirement under *Brown* v. *Board of Education,* 349 U. S. 294, to have the district courts supervise the effectuation of "a racially nondiscriminatory *school system*" (349 U. S. at 301, emphasis added). The Court in deciding the second *Brown* case, *supra,* pointed to administrative problems related to "the physical condition of the school plant, the school transportation system, *personnel,* revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations . . . ", as matters to be considered in appraising the time necessary for good faith compliance (emphasis added). We believe that the Court plainly regarded the

[14] *Griffin* v. *School Board of Prince Edward County,* 377 U. S. 218 (schools); *Peterson* v. *Greenville,* 373 U. S. 244 (restaurant); *Johnson* v. *Virginia,* 373 U. S. 61 (courtroom); *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U. S. 714, 721 (employment); *Turner* v. *Memphis,* 369 U. S. 350 (airport restaurant); *Bailey* v. *Patterson,* 369 U. S. 31 (transportation); *Browder* v. *Gayle,* 352 U. S. 903 (buses); *Holmes* v. *Atlanta,* 350 U. S. 879 (municipal golf courses); *Dawson* v. *Baltimore City,* 350 U. S. 877 (municipal beaches).

task as one of ending *all* discrimination in school systems, including "personnel" as well as discrimination in the transportation system, attendance districts or the other factors mentioned. The delay countenanced by the "deliberate speed" doctrine was predicated on the assumption that dual school systems would be reorganized.

The brief of the United States, as *amicus curiae,* in *Calhoun* v. *Latimer,* 377 U. S. 263, argued in this Court that:

> Obviously, a public school system cannot be truly nondiscriminatory if the school board assigns school personnel on the basis of race. Full desegregation can never be achieved if certain schools continue to have all-Negro faculties while others have all-white faculties. Schools will continue to be known as "white schools" or "Negro schools" depending on the racial composition of their faculties. It follows that the school authorities must take steps to eliminate segregation of personnel as well as pupils. (Brief of the United States, pp. 39-40.)

The judgment in *Calhoun* was vacated without discussion of this issue, but in addition to the statements in *Brown* quoted above, this Court earlier had condemned state-imposed racial restrictions which produced inequalities in the training of a teacher. *McLaurin* v. *Oklahoma State Regents,* 339 U. S. 637. There, the Court found that racial restrictions would impair and inhibit the learning of a student seeking a graduate degree in education, and that the adverse affect on his education, would in turn be reflected in the education and development of those he taught 339 U. S. at 641. What is obviously true of the graduate

student in education cannot be less so when applied to students at the elementary and high school level.

The lower court's ruling that petitioners lack standing to question the Board's policy of assigning teaching personnel on a segregated basis as effectively preserves the traditional characterization of Fort Smith's schools as "white" or "colored", as racial signs over the doors. The ruling, moreover, is contrary to rulings on the standing issue in the Fourth, Fifth and Sixth Circuits,[15] each of which courts has read the attack on teacher segregation:

> " . . . as a claim that continued assigning of teaching personnel on a racial basis impairs the students' right to an education free from any consideration of race." *Mapp* v. *Board of Education of Chattanooga,* 319 F. 2d at 576.

The record, moreover, simply does not support the Eighth Circuit's conclusion (345 F. 2d at 125) that the district court refused to consider teacher desegregation because petitioners were not attending grades being desegregated.

The Board moved to strike petitioners' allegations regarding teacher segregation from the complaint (R. 6), contending such facts " . . . are insufficient to state a claim upon which plaintiffs are entitled to or can be granted any relief . . ." (R. 11). And at the hearing, when peti-

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[15] *Griffin* v. *County School Board of Prince Edward County,* 339 F. 2d 486 (4th Cir. 1964); *Jackson* v. *School Board of City of Lynchburg,* 321 F. 2d 230 (4th Cir. 1963); *Board of Public Instruction of Duval County* v. *Braxton,* 326 F. 2d 616, 620 (5th Cir. 1964); *Augustus* v. *Board of Public Instruction,* 306 F. 2d 862, 869 (5th Cir. 1962); *Northcross* v. *Board of Education of City of Memphis,* 333 F. 2d 661 (6th Cir. 1964); *Mapp* v. *Board of Education of Chattanooga,* 319 F. 2d 571 (6th Cir. 1963).

tioners' attorney attempted to question the Superintendent with reference to desegregation of teachers and administrative personnel, the Board's attorney objected, stating: " . . . . we do not conceive that to be an issue before the Court in this case. *No teachers are parties.*" (R. 84). (Emphasis added.)

The district court sustained objection, and during a subsequent colloquy with counsel explained that jurisdiction would be retained so that if there was " . . . a bona fide effort on the part of interested parties, particularly the teachers for assignment, . . . then they could simply intervene here . . . " (R. 118). Plaintiffs' counsel sought clarification as to whether it was the court's position that petitioners lacked sufficient interest to raise the question of faculty desegregation, and the court responded, "That is, in effect, the ruling of the Court . . . " (R. 118). Thus, the district court's opinion accurately summarizes its position:

> " . . . the court sustained an objection to the introduction of evidence by plaintiffs on the question of assignment of teachers, but in order to avoid a multiplicity of suits, the Court will retain jurisdiction of the case in order that the question may be raised if any proper party desires to *intervene.*" 232 Fed. Supp. at 843. (Emphasis added.)

Clearly, the district court contemplated that parties not then before the Court must "intervene" to question teacher segregation, which language refutes the Eighth Circuit's interpretation that petitioners may raise the teacher desegregation issue when they become eligible to enter desegregated grades. Even if its reading of the dis-

trict court's intention had been accurate, however, such a view would place unjustified restrictions on the right to relief of petitioners who seek for themselves, and all other Negro pupils in the system, not just desegregated assignments, but a desegregated school system. See *Bailey* v. *Patterson,* 369 U. S. 31, 33. *Potts* v. *Flax,* 313 F. 2d 284, 288-89 (5th Cir. 1963).

Approval of the Board's plan by the court below without requiring teacher desegregation further disadvantages petitioners for having sought relief in the courts. School systems required to desegregate in accordance with the standards contained in the H. E. W. guidelines, must take positive steps to eliminate faculty as well as pupil segregation.[16]

Obviously, the Fort Smith system cannot be desegregated as long as the faculty at each school is assigned on the basis of race. Just as obviously, the careers of Negro teachers in the South, particularly in Arkansas, are too tenuous to reasonably expect their participation in school desegregation suits.[17]

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[16] The H. E. W. Guidelines provide in Par. V B:

1. *Faculty and staff desegregation.* All desegregation plans shall provide for the desegregation of faculty and staff in accordance with the following requirements:

a. *Initial assignments.* The race, color, or national origin of pupils shall not be a factor in the assignment to a particular school or class within a school of teachers, administrators or other employees who serve pupils.

b. *Segregation resulting from prior discriminatory assignments.* Steps shall also be taken toward the elimination of segregation of teaching and staff personnel in the school resulting from prior assignments based on race, color, or national origin (see also, V. E. 4(b)).

[17] *Shelton* v. *Tucker,* 364 U. S. 479; *Bates* v. *Little Rock,* 361 U. S. 516; *United States* v. *Board of Education of Greene County,* 332 F. 2d 40 (5th Cir. 1964); *Brooks* v. *School District of Moberly,*

The number of Negro teachers in Fort Smith schools is ot large. Their assignment on a nonracial basis along ith white teachers in the system will hardly constitute a ajor administrative problem, and may substantially re- eve the "intense psychological impact" the Board fears ill result from assigning white children to Negro schools R. 36-37, 59-63). Indeed, it is significant that the Board's ar of psychological trauma was voiced only when white upils were to be assigned to school with all Negro faculties.

The significance of the decisions on teacher desegrega- on and their effects on society should not be ignored. In 64-65 Arkansas public schools employed 13,205 white achers and 3,545 Negro teachers.[18] Complete teacher gregation is maintained, except in Little Rock where, the fall of 1964, a Negro was named Supervisor of ementary Education. A similar situation exists in most uthern states. It is estimated that there are 419,199 ite teachers and 116,028 Negro teachers in 11 southern tes, six border states (excluding Maryland) and the strict of Columbia.[19] There was no faculty desegregation Alabama, Georgia, Louisiana, Mississippi and South rolina. One North Carolina district, two Florida dis- cts, and seven Tennessee districts had some faculty de- gregation.[20]

., 267 F. 2d 733 (8th Cir. 1959); *Henry* v. *Coahoma County*, ss. *Board of Education*, 8 Race Rel. L. Rep. 1480 (N. D. Miss. 3); *Goode* v. *Board of Education of Summers County*, 8 Race . L. Rep. 1485 (S. D. W. Va. 1963); *Bryan* v. *Austin*, 148 F. pp. 563, 567 (E. D. S. C. 1957); judgment vacated 354 U. S. 933.

[18] Southern Education Reporting Service, "Statistical Summary School Segregation-Desegregation in the Southern and Border tes", 14th Rev., Nov. 1964, p. 8.

[19] *Id.* at p. 2.

[20] *Id.* at pp. 2, 15, 39, 50.

Within the Negro community, Negro teachers generally are recognized as having a leadership role with a comparatively high economic position[21] but their potential as leaders in efforts to promote desegregation of public facilities and schools is limited.[22] Continued faculty segregation, posing the danger of discharge of Negro teachers as Negro pupils go to white schools where no Negro teachers are assigned threatens potentially disastrous social consequences for one of the most important social and economic groups in Negro communities in the South.

Increasingly, district courts are reaching the conclusion that faculty desegregation is not only necessary to effectuate the mandate of *Brown,* but that delaying the process until pupil desegregation is complete increases to the point of impossibility the difficulty of completely disestablishing segregation in the system.[23] But the courts of appeal, while apparently willing to affirm district court orders requiring faculty desegregation,[24] have hesitated to require immediate implementation of perhaps the most vital part of the school desegregation process, and in case after case, sus-

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[21] According to the 1960 census the median income for the non-white family was $3,662, but the median for the non-white family whose head was employed as an elementary or secondary teacher was $6,409 (1960 Census of Population, Vol. I, "Characteristics of the Population," Part I, U. S. Summary, Table 230, pp. 1-611).

[22] Lamanna, Richard A., "The Negro Teacher and Desegregation", *Sociological Inquiry,* Vol. 35, No. 1, Winter 1965.

[23] See *Christmas* v. *Board of Education of Harford County,* 231 F. Supp. 331 (D. Md. 1964); *Dowell* v. *School Board of Oklahoma City,* 219 F. Supp. 427 (N. D. Okla. 1963); *Board of Public Instruction of Duval County* v. *Braxton,* 326 F. 2d 616, 620 (5th Cir. 1964).

[24] *Board of Public Instruction of Duval County* v. *Braxton, supra.*

tain lower court rulings delaying teacher integration.[25] Its construction of the district court's ruling on teachers aside, the Eighth Circuit's decision here has the same effect as the rulings in the other courts of appeal, i.e., the delay of teacher desegregation until pupil desegregation is substantially complete.

Such delay has been criticized in a dissent to the Fourth Circuit's ruling postponing consideration of the teacher segregation issue in *Bradley* v. *School Board of Richmond, Va.*, 345 F. 2d 310, 324 (4th Cir. 1965) by Judges Sobeloff and Bell in terms appropriate to this case:

> The composition of the faculty as well as the composition of its student body determines the character of a school. Indeed, as long as there is a strict separation of the races in faculties, schools will remain "white" and "Negro" making student desegregation more difficult. . . . The question of faculty desegregation was squarely raised in the District Court and should be heard. It should not remain in limbo indefinitely. After a hearing there is a limited discretion as to when and how to enforce the plaintiffs' rights in respect to this, as there is in respect to other issues,

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[25] *Wheeler* v. *Durham City Board of Education*, —— F. 2d —— (4th Cir. No. 9630, June 1, 1965); *Gilliam* v. *School Board of City of Hopewell*, 345 F. 2d 325 (4th Cir. 1965); *Bradley* v. *School Board of Richmond, Va.*, 345 F. 2d 310 (4th Cir. 1965); *Bowditch* v. *Buncombe County Board of Ed.*, 345 F. 2d 329, 332, 333 (4th Cir. 1965); *Griffin* v. *Board of Supervisors*, 339 F. 2d 486, 493 (4th Cir. 1964); *Jackson* v. *School Board of the City of Lynchburg*, 321 F. 2d 230, 233 (4th Cir. 1963); *Price* v. *Denison Independent School District*, —— F. 2d —— (5th Cir. No. 21632, July 2, 1965); *Lockett* v. *Board of Education of Muscogee County Sch. Dist., Ga.*, 342 F. 2d 225, 229 (5th Cir. 1965); *Bivins* v. *Board of Public Education and Orphanage for Bibb County, Ga.*, 342 F. 2d 229, 232 (5th Cir. 1965); *Calhoun* v. *Latimer*, 321 F. 2d 302, 311 (5th Cir. 1963); *Northcross* v. *Board of Education of City of Memphis*, 333 F. 2d 661, 666-67 (6th Cir. 1964); *Mapp* v. *Board of Education of Chattanooga*, 319 F. 2d 571 (6th Cir. 1963).

since administrative considerations are involved; but the matter should be inquired into promptly. There is no legal reason why desegregation of faculties and student bodies may not proceed simultaneously.

The views expressed by Judges Sobeloff and Bell, petitioners submit, are constitutionally and practically correct. A policy of assigning teachers to schools on the basis of the race of the pupils is plainly invidious even without regard to its effect on what schools various pupils attend. Pupils admitted to public schools are entitled to be treated alike without racial differentiations in those schools. *McLaurin* v. *Oklahoma State Regents, supra.* The student's relationship with teachers is central to the educational experience in public schools. When a state decrees that those Negro pupils in all-Negro schools be taught only by Negro teachers and that those Negro pupils in schools with white children be taught only by white teachers, it significantly perpetuates the segregation of Negro Americans in their educational experience. This is contrary to the egalitarian principle of the Fourteenth Amendment and the teaching of *Brown* that segregated education is "inherently unequal."

The issues presented by the grade-a-year plan and the faculty segregation issue merge into a common problem of vital importance to the implementation of the *Brown* decision, and deserve review by this Court.

CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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II

MOTION FOR LEAVE TO ADD PARTY PLAINTIFFS

Petitioners, pursuant to the provisions of Rule 21, Federal Rules of Civil Procedure, move the Court for leave to add as party plaintiffs in the subject case Vera Moore, minor, by her mother and next friend, Mrs. Ellsworth Winton, and Karen Jones, minor, by her mother and next friend, Mrs. Beatrice C. McCain, and in support of said motion show the Court:

1. Each of the parties who join in this motion to be added as plaintiffs in this case are Negroes and are residents of Fort Smith, Arkansas. Vera Moore is eligible to enter the 10th grade in the Fort Smith public schools and has been assigned to the Negro Lincoln High School. Karen Jones is eligible to enter the 11th grade in the Fort Smith public schools and has been assigned to the Lincoln High School.

2. This action was filed in September 1963 to desegregate the public schools in Fort Smith, Arkansas, by Mrs. Corine Rogers on behalf of her two minor daughters, Janice and Patricia Rogers, both of whom were then assigned to the Lincoln High School. The suit sought relief for both the named plaintiffs and for all other persons similarly situated. The parties seeking to be added as plaintiffs are members of the class upon whose behalf relief was sought in the subject case.

3. The proposed minor party plaintiffs in this action could have been original proper party plaintiffs, having been enrolled in the Fort Smith public schools and suffer-

ing from the racial segregation existing in the school system at the time this action was filed.

4. Moreover, the parties seeking to be added as party plaintiffs seek relief requiring the complete desegregation of the Fort Smith schools and their immediate admission to the white Northside High School for all the reasons originally stated by petitioners.

5. During the period since this suit was filed, one of the original minor plaintiffs, Janice Rogers, has graduated from the Lincoln High School and is thus no longer enrolled in the Fort Smith public school system. The other minor plaintiff, Patricia Rogers, will enter the 12th grade at the Lincoln High School in September 1965, and may graduate before all the relief sought in the complaint can be obtained and the issues raised by this litigation finally settled.

6. Petitioners, thus seek to add additional party plaintiffs so as to insure complete and effective disposition of all issues raised in this case and avoid any possibility that the class will not be adequately represented.

7. Granting petitioners' motion will make members of the represented class real parties in interest, and will not result in embarrassment or unfair handicap to the defendants. *Mullaney* v. *Anderson,* 342 U. S. 415.

WHEREFORE, for all the foregoing reasons, petitioners move the Court for leave to add as party plaintiffs in the subject case Vera Moore, minor, by her mother and next friend, Mrs. Ellsworth Winton, and Karen Jones, minor, by her mother and next friend, Mrs. Beatrice C. McCain.

Respectfully submitted,

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APPENDIX

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APPENDIX

[833]

Opinion Dated August 19, 1964

UNITED STATES DISTRICT COURT

W. D. ARKANSAS, FORT SMITH DIVISION

No. 1741

JANICE ROGERS, a Minor, age 16, PATRICIA ROGERS, a Minor, age 15, by Their Mother and Next Friend, MRS. CORINE ROGERS,

Plaintiffs,

—v.—

DR. EDGAR F. PAUL, DR. ROGER BOST, JOHN M. YANTIS, BRUCE SHAW, JACK GROBER, DOUGLAS G. ROGERS, Board of Directors of Special School District of Fort Smith, Arkansas, CHRIS CORBIN, Superintendent of Schools of Special School District of Fort Smith, Arkansas, SPECIAL SCHOOL DISTRICT OF FORT SMITH, ARKANSAS, a Corporation,

Defendants.

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232 F. Supp. 833

George Howard, Jr., Pine Bluff, Ark., for plaintiffs.

Daily & Woods, Shaw, Jones & Shaw, Fort Smith, Ark., for defendants.

JOHN E. MILLER, Chief Judge.

On September 12, 1963, plaintiffs filed their complaint against the Directors and the Superintendent of the Special School District of Fort Smith, Arkansas, and against

the District, in which they alleged that the defendants, and each of them, while acting in their official capacities have denied in the past, are now, and threaten to continue to deny to minor plaintiffs and the members of the class of persons that they represent, their rights, privileges and immunities as citizens of the United States and the State of Arkansas by engaging in the following:

"A. By maintaining and operating segregated public high schools within the Special School District of Fort Smith, Arkansas for minor plaintiffs and the members of the class of persons that they represent and assigning minor plaintiffs and the members of the class of persons that they represent to segregated public high schools in said district because of their race and color contrary and in violation of the equal protection and due process clauses of the Fourteenth Amendment to the federal Constitution; and,

"B. By maintaining and operating a dual scheme of attendance areas based solely on race with the assignment of high school pupils to schools in the district on the basis of their attendance areas in which they live, except that Negro high school pupils who do not reside in the Negro attendance area are required to attend the high school in the Negro attendance area, and the white high school pupils residing in [834] the Negro attendance are required to attend high school in a white attendance area, all of which violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution; and,

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"C. By maintaining and approving of budgets making available funds, school construction programs and curricula designed to perpetuate and maintain compulsory racially segregated schools, all of which violate the Fourteenth Amendment to the Constitution of the United States; and,

"D. By the assignment of teachers, principals and other administrative personnel to the various high schools within the Special School District of Fort Smith, Arkansas on the basis of their race and color and on the basis of the race and color of the pupils, all of which is being done to the detriment of the plaintiffs and the members of the class of persons they represent and in violation of the Fourteenth Amendment to the Constitution of the United States."

That after conferring with defendants in an effort to persuade them to cease and discontinue the alleged unlawful and discriminatory practices, the minor plaintiffs tried to enroll at one of the white high schools in the District but were refused admission; that in June 1963 the plaintiffs invoked rights under the Arkansas Pupil Assignment Law by filing a written request for transfer from the all-Negro high school to the Northside white high school and requested a hearing before the Board; that "defendants have refused to enroll or admit minor plaintiffs to the Northside white school because of their race and color, contrary to and in violation of the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States."

That the minor plaintiffs, and each of them, and the members of the class of persons that they represent, have been and are now being greatly harmed, damaged and injured by the unlawful, wrongful and knowing acts of the defendants.

The prayer of the complaint is that the cause be advanced on the docket and be set for a speedy hearing; that a temporary injunction be issued to enjoin and restrain defendants from further denying and depriving minor plaintiffs, and the members of the class of persons that they represent of their rights, privileges and immunities as citizens of the United States, or the equal protection of the laws secured to them by the Constitution and laws of the United States on the basis or classification of race or color; that upon a final hearing the temporary injunction be made permanent, and that the defendants and their successors in office be enjoined and restrained "from assigning teachers, principals and other administrative personnel to the schools within the Special School District of Fort Smith, Arkansas, or any public school that is under the supervision or control of the defendants, on the basis of their race and color and on the basis of the race and color of the pupils in said district."

On October 7, 1963, defendants filed their joint answer, in which they specifically denied that they have discriminated against the plaintiffs or the class of persons whom plaintiffs represent, because of race and color.

The defendants incorporated in their answer a motion to strike sub sub-paragraph D of sub-paragraph 9 of paragraph IV of the complaint on the ground that the facts

therein alleged are insufficient to state a claim upon which plaintiffs are entitled to or can be granted any relief.

Paragraph III of the answer is as follows:

"The defendants allege that on July 16, 1956, the defendants and their predecessors in office as members of the Board of Directors of the Special School District of Fort Smith, Arkansas, voluntarily and unanimously adopted a Plan of desegregation applicable to all of the schools administered and maintained by the Special School District of [835] Fort Smith, Arkansas, which Plan is enunciated and set forth in an exchange of letters from the then President of the Board of Directors of the Special School District of Fort Smith under date January 5, 1956, addressed to the attorney member of the then Board of Directors of the District, Mr. Owen C. Pearce to Mr. Frank Beckman, President of the Board of Directors of the Special School District of Fort Smith under date of April 30, 1956, copies of which two said letters embodying said Plan of desegregation are annexed to this Answer as Exhibits A and B hereto and made a part hereof to the same extent at this point as if copied in full in this Answer.

"Defendants further allege that said Plan of desegregation was placed in full effect by the defendants and their predecessors in office upon the commencement of the school term in September 1957, at which term the First Grade in all of the elementary schools administered and maintained by the defendants was fully desegregated under said Plan and at which time

the defendants cancelled and voided all pre-existing separate geographical districts for white and Negro pupils applicable to the First Grade in all of the defendants' schools.

"Thereafter these defendants and their predecessors as members of the Board of Directors of the Special School District of Fort Smith have, each year at the commencement of the September term of the schools of the district, likewise desegregated the next highest grade in said schools and cancelled and voided all pre-existing separate geographical districts for white and Negro pupils applicable to each successive higher grade, thus progressing through September, 1963, to full desegregation through the Seventh Grade, abolishing all pre-existing separate geographical districts for white and Negro pupils applicable to Grades One to Seven inclusive.

"Defendants allege that said Plan is in full conformity with the decision of the United States Supreme Court in Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083; is fully consistent therewith and with the test of 'all deliberate speed' prescribed in said decision under the facts and circumstances then and thereafter and now existing in the community served by the Special School District of Fort Smith; that the administration of said Plan by the defendants as above set forth is in conformity with and not violative of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution as heretofore interpreted

by the Supreme Court of the United States and other Courts of Appeal of the United States.

"That the plaintiffs and the class whom they represent have acquiesced in the administration of said Plan by the defendants as consistent with the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, as interpreted by the courts of the United States, from its inception in 1957 down to the filing of this action.

"That said Plan, as voluntarily adopted and administered by the defendants and their predecessors in office, has proved workable, beneficial and non-discriminatory for all of the patrons of the Fort Smith Special School District and the inhabitants of the community which it serves, regardless of race or color.

"That said Plan is non-discriminatory on the basis of race or color upon its face and as in fact administered by the defendants from September, 1957, down to the present.

"That said Plan as so administered has fostered and promoted harmonious and peaceful relationships [836] between all pupils and patrons of the Fort Smith Special School District and citizens of the community which it serves during the entire period of its operation down to the present, and provides a vehicle by which a transition from a totally segregated to a totally desegregated school system can be accomplished with a minimum of administrative problems.

"That there still exist administrative problems of various natures involved in the continued transition from segregated schools to desegregated schools, some

of which are peculiar to the presently remaining segregated grades Eight through Twelve, which grades the defendants in all good faith intend to continue to desegregate in accordance with the Plan, a grade each year; and a continuance of the Plan in its present form will foster the orderly, peaceful and harmonious solution of such administrative problems. Disruption or material alteration of the Plan at this stage of its progress will aggravate and accentuate the administrative problems confronting the defendants and peculiarly affecting the desegregation of grades Eight through Twelve, and will thereby cause a deterioration and down grading of the educational opportunities that can be afforded by the defendants to all of the patrons of the defendant District over the course of the next five years, to the detriment of all of the students of the defendant District, both Negro and white.

"That the progression of the Plan of desegregation, as adopted and placed in effect by the Special School District of Fort Smith, presently constitutes a desegregation with 'all deliberate speed', in compliance with the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution as interpreted and declared by the United States Courts."

The cause was set for trial on its merits on November 21, 1963, but it developed that facilities for holding court would not be available on that date, and the case was stricken from the trial calendar subject to resetting.

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On June 2, 1964, the court fixed June 18, 1964, as the date for a pretrial conference to be held in the Circuit Court room in the Sebastian County Courthouse.

On June 13, 1964, the defendants filed an amendment to their answer in which they referred to the original plan of desegregation that had been voluntarily and unanimously adopted by the defendants and their predecessors and placed in operation upon the commencement of the school term in September 1957. In the amendment the defendants set forth the status of the program under the plan heretofore referred to as carried out in those schools, the attendance areas of which include both white and Negro pupils.

The plan under which the defendants were operating when this suit was filed provided in subsection (b) of numbered paragraph 2:

> "No pupil whose race or color is in the minority in a given school should be required to attend that school. He should be allowed, but not required, to attend the school nearest his home in which his race or color predominates."

The defendants prayed in the amendment to their answer that "in the event the Court rules that the voluntary transfer provisions of the present plan of integration of Fort Smith Special School District and heretofore in effect since September 1957 be violative of any rights of the plaintiffs, that the Court grant the defendants reasonable time in which to promulgate and file with the Court and serve upon the plaintiffs a revised plan for the future continued integration of the schools in the Fort Smith Spe-

cial School District eliminating therefrom the voluntary transfer provisions on the basis of race heretofore in effect; and pray otherwise as in their original Answer."

[837] At the pretrial conference on June 18, 1964, the court held that the action heretofore taken under subsection (b) of numbered paragraph 2 (the voluntary transfer provision) of the original plan of integration is invalid, and that the defendants should have a reasonable time to prepare, serve and file a revised plan of integration. In accordance with such findings the defendants were ordered to prepare, serve and file with the court in a reasonable time a revised plan for the integration of the schools of Fort Smith Special School District.

Also, at the same hearing it was announced that Mr. William M. Eads, Jr., had succeeded the named defendant, Douglas G. Rogers, as a member of the Board of Directors, and the said Eads was substituted as a party defendant.

On July 17, 1964, the defendants in compliance with the pretrial order of June 18 filed and served the revised plan of integration. The plan filed by the defendants consists of nine typewritten pages. It was introduced into evidence, and it seems unnecessary to copy herein the entire plan, but reference will be made herein to the provisions of the proposed plan that are specifically objected to by the plaintiffs.

On July 28, 1964, the plaintiffs filed their response to the revised plan, in which they alleged that the revised plan and the initial plan, under which the defendants have heretofore operated the schools "do not represent a good

faith and prompt effort to desegregate the Special School District of Fort Smith, Arkansas, with all deliberate speed within the meaning of the United States Supreme Court's Mandate in the Brown case." That the revised plan does not offer any benefits to the minor plaintiff, Patricia Rogers, who is now in the 11th grade; that the other named plaintiff, Janice Rogers, graduated from high school during the last school term and did not have an opportunity to enjoy the benefits to be derived from an integrated education,[1] and "if the court should countenance the delay which is advocated by defendants, which plaintiffs assert that defendants have not shown any necessity for such delay, this minor plaintiff also will be denied her rights to an integrated education." That the revised plan makes no provisions for the desegregation of the teaching and administrative personnel in the schools within the Special School District of Fort Smith, Arkansas, all in violation of the Fourteenth Amendment to the United States Constitution. "That the Lincoln attendance area under the proposed reorganization will still be based solely on race, all in violation of the federal Constitution."

The cause was tried to the court on August 10, 1964. The defendant, Chris Corbin, Superintendent of Schools of the Special School District of Fort Smith, Arkansas, called as a witness by defendants, testified at length. By agreement the original plan of integration, appearing as Exhibit A to the original answer and which became effective with the beginning of the school term in September

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[1] Plaintiff Janice Rogers is now enrolled in the Fort Smith Junior College, a completely integrated college.

1957, and the proposed revised plan filed herein on July 17, 1964, were introduced into evidence together with maps of the proposed attendance areas under the proposed and revised plan.

The plaintiffs also called Mr. Corbin as a witness and introduced Exhibits 1 through 8, but it seems unnecessary to set forth such exhibits for the reason that in the opinion of the court they are not helpful in determining the issues raised by the pleadings and the proposed revised plan and the objections of the plaintiffs thereto. These exhibits were introduced by plaintiffs in support of sub-paragraph 9-C of paragraph IV of the specific allegations of the complaint, but they in nowise tend to establish that the defendants have been maintaining and approving budgets making available funds, school construction programs and curricula designed to perpetuate and [838] maintain compulsory racially segregated schools.

The plaintiffs also called as witnesses S. E. Bullock, Principal of Lincoln High School, and the plaintiffs Mrs. Corine Rogers and Miss Patricia Rogers. The plaintiff Mrs. Corine Rogers, mother of Miss Patricia Rogers, testified that she would like for her daughter to be "exposed to an integrated education." The daughter testified that she would like to attend an integrated high school because Negroes are now in competition with white people as well as with Negroes, and she felt that she would have a better chance to succeed by graduating from an integrated high school.

There are 30 schools situate in the defendant District and operated by the defendant Directors. In the school year 1963-64 there was a total of slightly more than 14,000

pupils residing in the District. The average daily attendance of Negro pupils was 1,082 while the average daily attendance of white pupils was 11,423.

The school population prior to World War II had remained practically static for several years, but increased rapidly in the decade of 1940 to 1950. In 1948 the defendant District found it necessary to engage in a huge building program, which program is now practically completed, and all the new buildings will be in operation with the beginning of the school year 1964-65. The District plans to demolish the old Washington elementary school building which has heretofore been attended exclusively by Negroes. The building is antiquated and the other buildings are in excellent condition and the facilities are ample. Under the revised plan the students formerly attending will be transferred to other schools that are predominantly white and located in the attendance area of the residence of the pupils.

At the end of the school year 1962-63 the elementary grades, 1 through 6, had been integrated according to the original plan. At the beginning of the school year 1963-64, the 7th grade was integrated in accordance with the original plan. In the defendant District the elementary grades include 1 through 6, the junior high schools include grades 7 through 9, and the senior high schools include grades 10 through 12.

During the 1963-64 school year white and Negro pupils availed themselves of the provisions for voluntary transfer contained in the original plan heretofore set forth, and the record discloses that a total of 323 white pupils voluntarily transferred from schools to which they had been assigned situated in their residential areas to vari-

ous other schools. During the same time 214 Negro pupils transferred from schools located in their residential areas to other schools that were predominantly Negro. Only 39 Negro pupils were enrolled and attended a predominantly white school during that school year, and no white pupils were enrolled or attended a school that was predominantly Negro. If the original plan had not contained the voluntary transfer provision, there would have been approximately 170 Negro pupils required to attend schools that were predominantly white and approximately 100 white students would have been required to attend schools that were predominantly Negro.

It will be observed from statements heretofore made that the pupils of both races availed themselves of the provisions of the original plan for voluntary transfer. It seems clear that the great majority of pupils, white and Negro, do not desire to attend an integrated school.

On June 3, 1963, the Supreme Court handed down the opinion in Goss v. Board of Education, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632, in which the court held that similar voluntary transfer provisions in a plan were void and unconstitutional. The court, in discussing the transfer provision under consideration in that case, beginning at page 686 of 373 U. S., at page 1408 of 83 S. Ct., said:

> "It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation. Indeed, the provisions can work only [839] toward that end. While transfers are available to those who choose to attend school where their race is in the majority, there is no provision whereby a student might trans-

fer upon request to a school in which his race is in a minority, unless he qualifies for a 'good cause' transfer. As the Superintendent of Davidson County's schools agreed, the effect of the racial transfer plan was 'to permit a child [or his parents] to choose segregation outside of his zone but not to choose integration outside of his zone.' Here the right of transfer, which operates solely on the basis of a racial classification, is a one-way ticket leading to but one destination, i.e., the majority race of the transferee and continued segregation. This Court has decided that state-imposed separation in public schools is inherently unequal and results in discrimination in violation of the Fourteenth Amendment. Brown v. Board of Education of Topeka, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). Our task then is to decide whether these transfer provisions are likewise unconstitutional. In doing so, we note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which he requested transfer we would have an entirely different case. Pupils could then at their option (or that of their parents) choose, entirely free of any imposed racial considerations, to remain in the school of their zone or to transfer to another."

At page 689 of 373 U. S., at page 1409 of 83 S. Ct. the Court said:

" • • • The transfer provisions here cannot be deemed to be reasonably designed to meet legitimate local problems, and therefore do not meet the require-

ments of Brown. Accordingly, the decisions of the Court of Appeals, insofar as they approve the transfer provisions submitted by the boards of education of Knoxville, Tennessee, and Davidson County, Tennessee, are reversed and the cases are remanded to the Court of Appeals with directions to remand to the District Courts for further proceedings in accordance with this opinion."

When that decision was announced the defendant Directors began consideration of an amendment to their integration plan under which the schools had been operated since the beginning of the school term in 1957. On September 9, 1963, three months and six days after the release of the opinion in the Goss case, the plaintiffs commenced the instant action. As a result of the order of this court entered June 18, 1964, the defendants asked and were granted permission to serve and file a plan for integration as a substitute for the original plan. In the revised plan the defendant Board of Directors stated that their predecessors announced in 1956 their intention to integrate the District schools in accordance with the Brown decision. The Board at that time recognized that there were a number of factors that were required to be taken into consideration in arriving at a satisfactory solution of the problem and in formulating a plan for integration agreeable to constitutional principles. In the revised plan the defendants stated:

"This Board recognizes that these same elements must still, in varying degrees, be taken into account

in revising the present plan. A revised plan must meet the mandate of the courts as laid down in later decisions.

"The Board reaffirms its former position to endeavor to effect a constitutional solution of the problem. As a part of its revised plan of integration it re-adopts the policies that it used as a basis for the original approach to the matter in 1956. Inasmuch as any revised plan must take into account the progress that has already been made, and inasmuch as the sufficiency of a revised [840] plan must be determined in the light of the experience heretofore gained, the Board feels the the original declaration of the Board establishing the policy and Plan of Integration should be re-stated and incorporated into this revision:"

Then follows a restatement of the policy, and after restating such policy the defendants set forth that subsequent decisions of the Supreme Court and other appellate courts require a modification of the present plan of integration, but that these modifications do not require that the policy of the Board be changed inasmuch as the announced policy on integration is consistent with and broad enough to be a basis of a revised plan that will in the judgment of the Board be adequate. Continuing the defendants said:

"As a result of the original Plan of Integration the Special School District of Fort Smith, Arkansas, will enter the eighth year of its plan for voluntary integration at the beginning of the 1964-65 school year. In accordance with this present plan of voluntary integration grades 1 through 8 will be integrated at the be-

ginning of the 1964-65 school term. The Revised Plan of the Board provides to continue to integrate the school system one grade at a time as it has heretofore done."

The Board of Directors then deals with the schools in the "elementary level" and in the "secondary level." Without doubt, in a District the size of the defendant District the most approved and efficient plan calls for a division of the schools in what school men term the "6-3-3" plan of operation, which is to say that the first six grades should be classified as elementary, the next three grades as junior high, and the last three grades as senior high. The revised plan clearly outlines the changes necessary to put such a classification in effect, and it is necessary to create new junior high school attendance areas in order to take full advantage of the new system and as required by the huge building program hereinbefore referred to. The plan further provides:

"Under the revised plan of integration the Board will continue to integrate at the secondary level one grade at a time. During the 1964-65 school year grade eight will be integrated at the junior high school level. This will result in 197 Negro pupils being integrated in previously all white junior high schools.

"'Complying with the Court's direction, the Board directs the discontinuance of the practice of voluntary transfer as provided in the original plan of integration. Any transfer either voluntary or involuntary of a pupil from one secondary school district to another

must be done hereafter for reasons that appear adequate to the administration, which reasons are neither based upon nor influenced by race or color."

The plaintiffs contend that the revised plan of integration and defendants' initial plan of integration "do not represent a good faith and prompt effort to desegregate the Special School District of Fort Smith, Arkansas, with all deliberate speed within the meaning of the United States Supreme Court's Mandate in the Brown case." They also argue that there has been too much deliberation and not enough speed.

When the actions of the School Board from 1956 to the present time are considered, along with the many decisions of the Supreme Court and the appellate courts, it is difficult for this writer to understand why such contentions would be made. There have been and is now an exceptionally harmonious and cooperative relationship between the races in Fort Smith, Arkansas. Integration is an accomplished fact, and certainly the School District, acting through its Directors, made "a prompt and reasonable start towards compliance with the Brown decision."

In Brown v. Board of Education, (1955) 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, the court, beginning at page [841] 300 of 349 U. S., at page 756 of 75 S. Ct., said:

> " * * * Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

To that end, the courts may consider problems related to administration, arising from the physical condition of the school plan, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system."

The plaintiffs cited and seem to rely upon the case of Watson v. City of Memphis (1963) 373 U. S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529, in their broadside assault upon the revised plan, but the court, beginning at page 531 of 373 U. S., at page 1318 of 83 S. Ct., said:

"This case presents no obvious occasion for the application of Brown. We are not here confronted with attempted desegregation of a local school system with any or all of the perhaps uniquely attendant problems, administrative and other, specified in the second Brown decision as proper considerations in weighing the need for further delay in vindicating the Fourteenth Amendment rights of petitioners. Desegregation of parks and other recreational facilities does not present the same kinds of cognizable difficulties inhering in elimination of racial classification in schools, at which attendance is compulsory, the adequacy of teachers and

facilities crucial, and questions of geographic assignment often of major significance."

In Aaron v. Cooper, (8 Cir. 1957) 243 F. 2d 361, the court had under consideration a judgment of the District Court for the Eastern District of Arkansas, 143 F. Supp. 855 (1956), in which the District Court approved a plan of integration promulgated and adopted by the Board of Directors of the Little Rock School District. The trial court at page 864 of 143 F. Supp. said:

"* * * The primary responsibility for the implementation of the constitutional principles announced in the May 17, 1954, decision, Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873, is upon the school authorities. It is the duty of the school authorities to solve the many and varied local problems. Because of the nature of the problems and the local conditions the school authorities often find that action taken by other school districts is inapplicable to the facts with which they are dealing. It is not the duty or function of the federal courts to regulate or take over and operate the public schools. That is still the duty of the duly state-created school authorities, but the free public schools must be maintained and operated as a racially nondiscriminatory system. During the period of transition from a segregated to a nonsegregated system the school authorities must exercise good faith. They must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along

with all the facts and conditions prevalent in the school district. Educational standards should not be lowered. If the school authorities have acted and are proceeding in good faith, their actions should not be set aside by a court so long as [842] their action is consistent with the ultimate establishment of a non-discriminatory school system at the earliest practicable date."

The Court of Appeals, in affirming the judgment of the District Court, beginning at page 363 of 243 F. 2d, said:

"Appellants cite to us several cases where Federal Courts have used their injunctive powers to speed up or effectuate integration. Willis v. Walker, D. C. W. D. Ky. 1955, 136 F. Supp. 177; Thompson v. County School Board of Arlington County, D. C. E. D. Va. 1956, 144 F. Supp. 239; Clemons v. Board of Education, 6 Cir., 1956, 228 F. 2d 853, certiorari denied 1956, 350 U. S. 1006, 76 S. Ct. 651, 100 L. Ed. 868; Booker v. State of Tennessee Board of Education, 6 Cir., 1957, 240 F. 2d 689. These decisions serve only to demonstrate that local school problems are 'varied' as referred to by the Supreme Court. A reasonable amount of time to effect complete integration in the schools of Little Rock, Arkansas, may be unreasonable in St. Louis, Missouri, or Washington, D. C. The schools of Little Rock have been on a completely segregated basis since their creation in 1870. That fact, plus local problems as to facilities, teacher personnel, the creation of teachable groups, the establishment of the

proper curriculum in desegregated schools and at the same time the maintenance of standards of quality in an educational program may make the situation at Little Rock, Arkansas, a problem that is entirely different from that in many other places. It was on the basis of such 'varied' school problems that the Supreme Court in the second Brown decision remanded the cases there involved to the local District Courts to determine whether the school authorities, who possessed the primary responsibility, have acted in good faith, made a prompt and reasonable start, and whether or not additional time was necessary to accomplish complete desegregation. The question of speed was to be decided with reference to existing local conditions."

Throughout the proposed revised plan the Board refers only to elementary and secondary schools for the reason that the "6-3-3" program cannot be inaugurated and effectively followed until there have been some necessary changes made, as set forth in the provisions of the revised plan, and in discussing those revisions the Board has referred to both junior high and senior high as schools of the secondary level, but when the revised plan is in operation, the Board states:

"In order to accomplish reorganization of the secondary schools the Board has established a transition period during the 1964-65 school year. Northside High School will house grades 10, 11 and 12. Southside Junior-Senior High School will house grades 9, 10 and 11 during the transition year. Lincoln will include grades 9, 10, 11 and 12 during the school year 1964-

65 and 10, 11 and 12 beginning with the school year 1965-66."

The plaintiffs made no contention as to the provisions of the revised plan which provides that in the interest of maintaining and insuring "quality education for all pupils" that the revised plan, insofar as the Howard Elementary School, the Dunbar Elementary School and the Washington Elementary School are concerned, shall not apply until the beginning of the school year 1965-66 for the reasons set forth in numbered paragraph 3-A, B and C of the revised plan.

The plaintiffs further contend that the revised plan is unconstitutional because under it teachers, principals and other administrative personnel of the high schools may be assigned on the basis of their race and color and on the basis of the race and color of the pupils which will be to the detriment of the plaintiffs and the members of the class of persons they represent.

In this connection, the defendants in their original answer filed October 7, [843] 1963, moved to strike sub-paragraph 9-D of Paragraph IV, which is the paragraph where the plaintiffs voice their objection to the plan because of the manner of providing for the assignment of teachers and other administrative personnel.

The court in the pretrial conference stated that the sub-paragraph would not be stricken for the reason that it might become material and require consideration if the question was raised by proper parties, and relying upon Mapp v. Board of Education of City of Chattanooga (6 Cir. 1963) 319 F. 2d 571, the court sustained an objection

to the introduction of evidence by plaintiffs on the question of the assignment of teachers, but in order to avoid a multiplicity of suits, the court will retain jurisdiction of the case in order that the question may be raised if any proper party desires to intervene.

At the close of the introduction of testimony the plaintiffs orally moved the court that they should recover their costs and a reasonable attorney's fee, and in support thereof have cited to the court the case of Bell v. School Board of Powhatan County, Va., (4 Cir. 1963) 321 F. 2d 494; Local No. 149 I. U., U. A., A. & A. I. W. v. American Brake Shoe Co., (4 Cir. 1962) 298 F. 2d 212; Rolax v. Atlantic Coast Line R. Co., (4 Cir. 1951) 186 F. 2d 473; and Buckner v. County School Board of Green County, (4 Cir. 1964) 332 F. 2d 452.

The court has examined all of the cases relied upon by plaintiffs in support of their motion for allowance of attorney's fees. Bell, supra, the court, in considering the question of allowance of attorney's fees in a school integration case, announced what this court believes to be the correct rule at page 500 of 321 F. 2d:

> " * * * The general rule is that the award of counsel fees lies within the sound discretion of the trial court but, like other exercises of judicial discretion, it is subject to review. The matter must be judged in the perspective of all the surrounding circumstances. Local 149, U. A. W. v. American Brake Shoe Co., 298 F. 2d 212 (4th Cir.), cert. denied, 369 U. S. 873, 82 S. Ct. 1142, 8 L. Ed. 2d 276 (1962). Here we must take into account the long continued pattern of eva-

> sion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education. To put it plainly, such tactics would in any other context be instantly recognized as discreditable. The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme. See Rolax v. Atlantic Coast Line R. Co., 186 F. 2d 473, 481 (4th Cir. 1961) (Parker, C.J.); cf. Vaughan v. Atkinson, 369 U. S. 527, 530-531, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962)."

Certainly the facts in the instant case do not justify the allowance of an attorney's fee to the plaintiffs, and therefore their motion should be overruled.

The facts reflect that the Directors and administrators of the school affairs of the defendant District have since 1956 been diligent in their efforts to integrate the schools as required by the decisions of the courts. The administration of the plan has been eminently successful and satisfactory. It has been accepted by the majority of pupils and parents as the best method of complying in good faith with the law. When the defendants discovered that the voluntary transfer provisions in the original plan was unconstitutional, they began to do something about it. Prior to the decision in the Goss case, the defendants were moving with all deliberate speed to make some necessary changes in the attendance areas in order to utilize all

the facilities of the District and to guarantee every child of school age the full enjoyment of his or her constitutional rights. In order to insure the attainment of that objective a plan had to be followed. It has [844] been followed for seven years, and under the proposed revised plan full and complete integration will be accomplished, and in order to insure such a result and the full implementation of the constitutional principles, the Directors and school authorities should not be deprived of the exercise of their sound discretion in the discharge of their primary responsibility for "assessing and solving the problems that confront them."

The revised plan should be approved, and judgment is being entered today, approving and confirming the revised plan as filed herein on July 17, 1964; retaining jurisdiction of the cause for a decision of any question that might arise as to the assignment of teachers and principals, but not to any other personnel, if presented by proper parties; dismissing the complaint of the plaintiffs except as to subparagraph 9-D of paragraph IV; and providing that the parties hereto shall pay their own costs.

Judgment

On August 10, 1964, this cause came on for trial to the court, without the intervention of a jury, the plaintiffs appeared by Mr. George Howard, Jr., their attorney, and the defendants appeared by Mr. J. S. Daily and Mr. Bruce H. Shaw, their attorneys.

Evidence on behalf of the parties was presented and, at the conclusion thereof, the case was submitted and taken under advisement by the court.

Now, having considered all the evidence adduced at the trial of this cause and all the pleadings herein, the court has prepared and filed its opinion herein, and in accordance therewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendant's Revised Plan of Integration, filed herein on July 17, 1964, be and hereby is approved and confirmed; that the court retain jurisdiction of the cause for a decision on any question that might arise as to the assignment of teachers and principals, but not as to any other personnel, if presented by proper parties; that the complaint of the plaintiffs, except as to subparagraph 9-D of paragraph IV, be and is dismissed and the parties hereto shall pay their own costs.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's motion for allowance of attorney's fees be and hereby is overruled.

This August 19, 1964.

JOHN E. MILLER
United States District Judge

[117]

Opinion Dated May 7, 1965

UNITED STATES COURT OF APPEALS

EIGHTH CIRCUIT

No. 17870.

345 F. 2d 117

JANICE ROGERS, a Minor, Age 16, PATRICIA ROGERS, a Minor, Age 15, by Their Mother and Next Friend, MRS. CORINE ROGERS,

Appellants,

—v.—

DR. EDGAR F. PAUL, DR. ROGER BOST, JOHN M. YANTIS, BRUCE SHAW, JACK GROBER, DOUGLAS G. ROGERS, Board of Directors of Special School District of Fort Smith, Arkansas; CHRIS CORBIN, Superintendent of Schools of Special School District of Fort Smith, Arkansas; SPECIAL SCHOOL DISTRICT OF FORT SMITH, ARKANSAS, a Corporation,

Appellees.

[118] Derrick A. Bell, Jr., New York City, made argument for appellants and filed brief with Jack Greenberg and John W. Walker, New York City, and George Howard, Jr., Pine Bluff, Ark.

Bruce H. Shaw, of Shaw, Jones & Shaw, Fort Smith, Ark., made argument for appellees and filed brief with John S. Daily, of Daily & Woods, Fort Smith, Ark.

Opinion Dated May 7, 1965

Before:

VOGEL, MATTHES and MEHAFFY,
Circuit Judges.

MATTHES, Circuit Judge.

In Goss v. Board of Education, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632, decided June 3, 1963, the Supreme Court held unconstitutional so-called voluntary transfer provisions incorporated in the formal desegregation plans adopted by the school boards of the Knoxville, Tennessee and the Davidson County, Tennessee School Districts. In the desegregation plan adopted by the school board of the Special School District of Fort Smith, Arkansas, a voluntary transfer provision was incorporated under which any student, upon request, was permitted, solely on the basis of his own race and the racial composition of the school to which he was assigned by virtue of the attendance area in which he resided, to transfer from such school, where he would be in racial minority to the school in which his race or color predominated.

Approximately three months after Goss was decided, Mrs. Corine Rogers, a Negro parent, filed this suit in behalf of her two minor daughters, Janice, then 16, and Patricia, then 15, and in behalf of all other Negro minors within the Special School District of Fort Smith, Arkansas, who are similarly situated because of race and color. She sought to enjoin the school board members and the District Superintendent, defendants in the action, from maintaining and operating segregated public schools in such district. Janice graduated from the twelfth grade upon completion

of the 1963-1964 school term, and as to her the issues presented by this litigation are now moot. Patricia will enter the last year of high school with the advent of the 1965-1966 school year.

The allegations of the complaint upon which plaintiffs (hereinafter designated as appellants) premise their right to relief appear verbatim in the District Court's opinion (Judge John E. Miller), 232 F. Supp. 833 (1964) and need not be fully restated herein. It is sufficient to recall that appellants alleged that defendants (hereinafter sometimes designated as appellees) were maintaining and operating segregated high schools for the minor appellants and the members of the class they represent; were maintaining and operating the voluntary transfer system for assignment of pupils; were maintaining and approving budgets, programs and curricula designed to perpetuate and maintain compulsory racially [119] segregated schools; and were assigning principals, teachers, and administrative personnel to the various high schools on the basis of their race and color, all in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

At a pretrial conference held after the issues had been joined, the Court ruled that the voluntary transfer provision was invalid and granted appellees a reasonable time to file a revised plan of integration. On July 17, 1964, appellees, in compliance with the Court's order, filed a revised plan which also came under attack by appellants.

After a trial on August 10, 1964, the Court, on August 19, 1964 filed its opinion, and entered judgment approving and confirming the revised plan of integration. The Court,

however, retained jurisdiction of the cause for a decision "of any question that might arise as to the assignment of teachers and principals."

We revert now to the original desegregation plan, the circumstances attending its adoption, its effect upon segregation, and to other pertinent facts and circumstances.

Following Brown v. Board of Education, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955), the Board of the Special School District of Fort Smith, pursuant to voluntary action on its part, announced a policy on integration of the Fort Smith public schools. The policy was enunciated in a plan which was formulated and adopted by the Board in 1956. The plan became effective at the beginning of the 1957-1958 school year, provided for the desegregation of one grade each year commencing with the first grade and progressing through the twelfth grade, and as noted, had incorporated therein the voluntary transfer provision.

There are now 30 schools in the District. In the 1963-1964 school year the total school population was slightly in excess of 14,000. The average daily attendance of Negro pupils was 1,082, and the average daily attendance of white pupils was 11,423. In that same school year 39 Negro pupils were enrolled in and attended predominantly white schools. It appears that pupils of both races took advantage of the voluntary transfer provision. Thus, by way of illustration, in the 1963-1964 year 323 white pupils and 214 Negro pupils transferred from schools located in their residential areas, which they were at liberty to attend, to other schools where their race predominated. The Superintendent testified without contradiction, that if the voluntary transfer provision had not been utilized there would have been 150 to

170 Negro pupils attending predominantly white elementary schools in the 1963-1964 year, and approximately 100 white students would have attended predominantly Negro schools in the same school year. The facts in regard to the transfer issue caused Judge Miller to observe "It seems clear that the great majority of pupils, white and Negro, do not desire to attend an integrated school." 232 F. Supp. at p. 838.

The revised plan readopted what may appropriately be referred to as the geographic school zoning system. The voluntary transfer provision was eliminated. Under the plan "all pupils will be assigned to the elementary school district in which they reside, without regard to race." However, there was excepted from the plan's operation for a period of one year the following three elementary school attendance areas having a predominantly Negro population: Howard Elementary School, having a ratio of approximately 55 white pupils to 530 Negro pupils; Dunbar Elementary School, having a ratio of approximately 22 white pupils to 60 Negro pupils; and Washington Elementary School, having a ratio of approximately 30 white pupils to 70 Negro pupils. The exception was made to permit pupils residing in the three named attendance areas to resort to the voluntary transfer provision for the stated period of one year.[1]

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[1] In justification of the exception, the Board stated that there "would be an intense psychological impact in the assigning of a minority of White pupils to previously all Negro elementary schools. * * * The Board feels that its good faith in formulating this Revised Plan cannot be challenged because of this element of delay in connection with these three schools when consideration is given to the fact that this revised plan will result in the im-

[120] The revised plan provides that integration was to continue on the basis of a grade each year until complete integration through the twelfth grade has been accomplished. Thus, under the plan the eighth grade was integrated during the 1964-1965 school year and four additional years will be required to fully integrate all grades.

Provisions in the revised plan, not found in the original one, are designed to effect reorganization and establish the 6-3-3 system so as to provide a basic six-year elementary school program, a three-year junior high school program, and a three-year senior high school program commencing in September 1965.[2]

The plan also contemplates a reorganization of the secondary schools in a manner that will better serve the

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mediate integration of more than 106 Negro pupils into the predominantly White elementary schools upon the Court's approval of this Revised Plan.

"(b) Because of the state of repair and the generally poor physical condition and inadequacy of facilities at Washington Elementary School, this school will be discontinued by the beginning of the 1965-66 school year. At that time and beginning with the 1965-66 school year, the Negro pupils within the present attendance area of Washington Elementary School will be assigned to the Sutton Elementary School and the Spradling Elementary School.

"(c) Beginning with the school year 1965-66 the Howard Elementary School and the Dunbar Elementary School will continue upon a fully integrated basis."

We assume that the one year moratorium applicable to the three named elementary schools will end with the termination of the 1964-1965 school year, and that grades one through nine will be integrated during the 1965-1966 school year.

[2] The plan designates the schools in which the reorganization will be accomplished. We deem it unnecessary to burden this opinion with an analysis of the plan in this regard.

community and meet the educational needs of the pupils. It is expressly provided that "Any transfer either voluntary or involuntary of a pupil from one secondary school district to another must be done hereafter for reasons that appear adequate to the administration, which reasons are neither based upon nor influenced by race or color."

The foregoing background facts bring us to the issues presented in this appeal. We will advert to other pertinent facts during our consideration and discussion of the contentions of the parties.

Summarily stated, appellants contend that the District Court erred in approving the revised plan for the reasons: (1) it unreasonably delays total desegregation for four years; (2) it unreasonably subjects the minor appellants and other Negroes similarly situated to an inferior as well as segregated education and prevents Patricia Rogers from attending the predominantly white Northside High School; (3) it deprives the minor appellants and other Negroes similarly situated of their constitutional right to instruction by teachers assigned without regard to race. The fourth and final contention brings into issue the refusal of the trial court to allow reasonable attorney's fees to appellants for the prosecution of this litigation.

We pause to observe that appellants do not attack or challenge the validity of the geographic school zoning system embraced by the revised plan. Neither is there any hint or suggestion of intentional gerrymandering of the school zones so as to confine one race to attendance at a particular school as was the situation in Taylor v. Board of Education of City School District of New Rochelle, 294 F. 2d 36 (2 Cir. 1961), cert. denied 368 U. S. 940, 82 S. Ct.

382, 7 L. Ed. 2d 339 (1961). Thus, we have here a case where the primary and basic complaint is that the school board has moved too deliberately and with insufficient speed in bringing about desegregation of all of the grades in the Fort Smith system. What appellants are obviously desirous of [121] accomplishing by this litigation is desegregation of grades nine through twelve by the beginning of the 1965-1966 school term.

Before turning to an evaluation of the original desegregation plan, its revision, and the Board's actions relating thereto, we deem it appropriate to again briefly review the pertinent criteria to be considered in resolving the issues presented.

In the second Brown case, the Supreme Court stated:

> "* * * [T]he courts will require that the defendants [Board] make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be

necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system * * *." 349 U. S. at pp. 300-301, 75 S. Ct. at p. 756.

Since Brown the time available for making the transition from a segregated to a desegregated school system has decreased and the emphasis on local problems has been reduced. See Watson v. City of Memphis, 373 U. S. 526, 83 S. Ct. 1314, 10 L. Ed. 2d 529 (1963); Goss v. Board of Education, 373 U. S. 683, 83 S. Ct. 1405 (1963); Griffin v. County School Board of Prince Edward County, 377 U. S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964); Calhoun v. Latimer, 377 U. S. 263, 84 S. Ct. 1235, 12 L. Ed. 2d 288 (1964). In Goss, supra, 373 U. S. at p. 689, 83 S. Ct. at p. 1409, the Court enunciated the context in which desegregation plans must be judged:

"* * * Indeed, it was consideration for the multifarious local difficulties and 'variety of obstacles' which might arise in this transition that led this Court eight years ago to frame its mandate in Brown in such language as 'good faith compliance at the earliest practicable date' and 'all deliberate speed.' Brown v. Board of Education, 349 U. S., at 300, 301, 75 S. Ct. at 756 [753]. Now, however, eight years after this decree was rendered and over nine years after the first Brown decision, the context in which we must interpret and apply this language to plans for desegregation has been significantly altered."

Delay issue.

[1] Although appellants do not expressly or impliedly assert that the revised plan is the product of or motivated by *actual* bad faith on the part of the Board members and Superintendent, they do assert, in effect, that the failure of the plan to provide for complete desegregation without further delay constitutes lack of good faith as a matter of law within the teachings of the Supreme Court in the Brown cases, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873; 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083, and the subsequent cases in which the Supreme Court expounded the Brown mandate. Thus, they argue that "there is no reason to prolong for another four years a procedure which practically and constitutionally can be accomplished in one."

Similar assertions made below were treated by Judge Miller in this language: "[w]hen the actions of the School Board from 1956 to the present time are considered, along with the many decisions of [122] the Supreme Court and the appellate courts, it is difficult for this writer [Court] to understand why such contentions would be made. There have been and is now an exceptionally harmonious and cooperative relationship between the races in Fort Smith, Arkansas. Integration is an accomplished fact,[3] and certainly the School District, acting through its Directors, made 'a prompt and reasonable start towards compliance with the Brown decision.'" 232 F. Supp. at p. 840.

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[3] Appellants acknowledge in their brief that "[a] private Junior college and the Catholic schools are integrated as are the local hotels, movie theatres, skating rinks, bowling alleys and the swimming pool."

This determination is factually sound and was not induced by an erroneous concept of the controlling legal principles. The integration plan adopted by the school board without compulsion, when evaluated in light of local conditions and administrative hurdles, convinces us that not only did the school board make a "prompt and reasonable start toward full compliance," but that desegregation has in fact moved forward with "all deliberate speed."

But appellants argue further that there was no showing of valid administrative problems justifying prolonging of complete desegregation for four additional years. We do not so read the record. Both appellants and appellees were satisfied to rely mainly on the testimony of the Superintendent of Schools of the Special School District of Fort Smith.[4] His testimony in substance was that since the voluntary adoption of the desegregation plan in 1956, the Board has continuously been confronted with administrative problems arising out of: (a) school population growth and inadequacy of buildings and other facilities; (b) mass shifting within the District of School population from the older sections of Fort Smith to new suburban areas; (c) the huge building program entailing an expenditure of approximately $10,000,000; and (d) the transition of all of the schools into a regular 6-3-3 system. The Superintendent further stated that to require immediate desegregation of the four remaining grades would give rise to

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[4] We note that appellants' case consisted of the Superintendent of Schools of the Special School District, the Principal of Lincoln High School and two of the appellants, Mrs. Corine Rogers and Patricia Rogers. Only the Superintendent of Schools testified on behalf of appellees.

additional administrative problems and would greatly hamper what has to date been an orderly desegregation of the schools. That the Superintendent was qualified to express the foregoing opinion can hardly be gainsaid. He had been in the Fort Smith school system for 24 years as a principal, 4 years as assistant superintendent, and 10 years as Superintendent. His uncontradicted testimony supports the conclusion that to compel immediate and complete integration would needlessly thwart the good faith efforts of the Board to accomplish de jure desegregation in a peaceful and orderly manner.

In further support of their contention that the Board has not gone forward with all deliberate speed, appellants make reference to recent Third, Fourth, Fifth and Sixth Circuit decisions which require school boards to desegregate all grades within no more than four to six years in lieu of the twelve year grade-a-year plans. A cursory examination of these authorities reveals one unavoidable and most significant factual dissimilarity with the facts presented in this appeal. Among other important factual variances, every case involved situations where the school boards had either failed to act in good faith or after inordinate delays had proposed a plan which was too slow and unduly protracted the process of desegregation. The courts were there confronted with proposed desegregation plans of the grade-a-year variety which were to commence from 5 to 10 years after the Supreme Court's first disposition [123] of the Brown case in 1954. In Evans v. Ennis, 281 F. 2d 385 (3 Cir. 1960), in the Fall of 1959 (5 years after Brown); Jackson v. School Board of City of Lynchburg, Virginia, 321 F. 2d 230 (4 Cir. 1963); in the Fall of 1962 (8 years after Brown); Bush v. Orleans Parish School Board, 308 F. 2d 491 (5 Cir. 1962),

the revised plan in the Fall of 1962 (8 years after Brown); Gaines v. Dougherty County Board of Education, 334 F. 2d 983 (5 Cir. 1964), in the Fall of 1964 (10 years after Brown); Stell v. Savannah-Chatham County Board of Education, 333 F. 2d 55 (5 Cir. 1964), cert. denied, Roberts v. Stell, 379 U. S. 933, 85 S. Ct. 332, 13 L. Ed. 2d 344 (1965); Armstrong v. Board of Education of Birmingham, 333 F. 2d 47 (5 Cir. 1964), in the Fall of 1963 (9 years after Brown); Goss v. Board of Education of the City of Knoxville, 301 F. 2d 164 (6 Cir. 1962), reversed on other grounds, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963), in the Fall of 1960 (6 years after Brown); Lockett v. Board of Education of Muscogee County, 342 F. 2d 225 (5 Cir. 1965), and Bivins v. Board of Public Education and Orphanage, 342 F. 2d 229 (5 Cir. 1965), in the Fall of 1964 (10 years after Brown).

Desegregation of the Fort Smith public schools stands out in bold contrast to desegregation efforts in some biracial districts where there was hard core opposition to any semblance of integration. See e. g. Griffin v. County School Board, 377 U. S. 218, 84 S. Ct. 1226, 12 L. Ed. 2d 256 (1964) for history of desegregation efforts in Prince Edward County, Virginia. In Fort Smith the transition was smooth and without incident. There was no manifestation of bad feeling or violent opposition. The lack of any evidence to indicate any serious objection to the plan of desegregation is impressive. So far as this record is concerned, both races are satisfied with the revised plan. It has been accepted by the majority of pupils and parents as the best method of complying in good faith with the law. To be sure, the original plan contained the voluntary transfer

provision which was struck down by the Supreme Court as violative of the constitutional rights of the Negro children. But this defect was eliminated without unreasonable delay, and full integration is now assured. Nearly one-third or approximately 300 of eligible Negro children attended schools having a predominantly white population in the current, 1964-1965 school year, and obviously the number will increase each of the four remaining years as integration moves forward. We are convinced, as was the able, understanding and discerning trial judge, that the administration of the plan has been eminently successful and satisfactory, and that the members of the Board and other school authorities should not be deprived of the right to exercise their sound discretion in discharging their primary responsibility for "assessing and solving the problems that confront them." Brown, supra.

Subjugation to inferior and segregated education issue.

[2] In support of their efforts to bring about full and immediate desegregation, appellants contend that Patricia Rogers[5] and other Negro high school students similarly situated are subjected to an inferior as well as segregated education. More specifically, we are requested to direct the entry of an order permitting Patricia to transfer from Lincoln High School to Northside High School for the 1965-1966 school year in order that she may avail herself of an integrated education and be permitted to obtain instruc-

[5] As we have seen, Janice Rogers graduated from Lincoln High School in 1964. The record shows that she is presently attending the Fort Smith Junior College which is completely desegregated.

tion in journalism, music, and German, which are unavailable at Lincoln. In regard to the alleged inferior education available to Negro students, the Superintendent testified without contradiction that the Lincoln High School [124] facilities have been regularly improved;[6] and there exists an equal apportionment of teachers per pupil throughout the three high schools;[7] that the per pupil operating cost for Lincoln was greater than the largest white high school;[8] and that "Lincoln High School has been accredited by the North Central Association since 1924, before that it was accredited by the Southern Association, and it meets fully the requirements of the students under requirements of the North Central Association for full accreditation." Additionally, the Superintendent stated:

> "* * * you try to step up a curriculum based on the size and what the pupils request in the school. We have told all of our high schools, all three of them, that we would offer *any* course requested if there are as many as six students that want the course and we

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[6] In reviewing the improvements of the Negro schools he stated: "At Lincoln High School, dropping back to the beginning of our building program, back about the 1948 to 1950 era, we built a new shop building there and did considerable renovation on the old building, and then about two years ago we built a new gymnasium and a new classroom wing, so there has been considerable improvement."

[7] The predominantly white Northside and Southside High Schools have approximately 85 teachers for 2300 students and 40 teachers for 1000 students, respectively; Lincoln High School has 21 teachers for less than 500 students.

[8] During the 1962-1963 school year the per pupil operating cost at Northside was $269.00 per pupil; at Lincoln it was $288.00 per pupil.

> can find a teacher to teach it. Lincoln High School and Northside High School have been North Central accredited High Schools, the same length of time, I believe since 1924. The Southside High School is not accredited by the North Central Association at the present time. Therefore the offerings in each school are based on what the students want in the school."

This record provides no basis or warrant for an order directing the Board to transfer Patricia Rogers from Lincoln to Northside High School for the 1965-1966 school year. True, in Jeffers v. Whitley, 309 F. 2d 621, 629 (4 Cir. 1962) and Board of Education of St. Mary's County v. Groves, 261 F. 2d 527, 529 (4 Cir. 1958) immediate relief was granted to individual plaintiffs; however, unlike here, in those districts the geographic school zoning system had not been adopted. We observe that in Jeffers, supra, at fn. 11, p. 627 of 309 F. 2d, the Court recognized the basic and necessary distinction between a "voluntary application for assignment system" and a "geographic school zoning assignment system," stating, "In other systems of assignment, as those based upon geographic school zoning, the wish of the individual may be, and usually is, immaterial. It is the essence of a voluntary system of racial separation." As we have indicated, appellants have no quarrel with the geographic school zoning system embraced in the Fort Smith plan of desegregation. Patricia Rogers resides within three blocks of Lincoln High School and within Lincoln's geographical attendance area. Under the plan she is required to attend Lincoln High School. To allow her to transfer would constitute discriminatory action in her favor,

would open the door to similar requests, and would weaken the stability of the entire geographic attendance area system. Compare Downs v. Board of Education of Kansas City, 336 F. 2d 988 (10 Cir. 1964), cert. denied 85 S. Ct. 898, where the Court very pertinently stated:

> "While there seems to be authority to support that contention,[9] the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools [125] and Negro children have no constitutional right to have white children attend school with them. (citing cases).
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> "'* * * "there is no affirmative U.S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils."'" 336 F. 2d at p. 998.

Teacher issue.

[3] Desegregation of teachers is recognized as a part of the over-all desegregating process, and courts have been ordering districts to undertake teacher integration as a part of the total job of desegregating the schools. Pupils in grades that are integrated have standing to challenge faculty segregation, not necessarily for the purpose of protecting the constitutional rights of the teachers, but in

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[9] In Downs, appellants contended that even though the Board was not pursuing a policy of intentional segregation, there was still segregation in fact and that the Board was required to eliminate segregation in fact as well as segregation by intention.

order to insure that the pupils will not be discriminated against on the basis of their race. Hence, under proper circumstances pupils are within their rights in insisting that a teacher not be selected on the basis that the teacher's race corresponds to their own. See and compare Augustus v. Board of Public Instruction, 306 F. 2d 862 (5 Cir. 1962); Mapp v. Board of Education of Chattanooga, 319 F. 2d 571 (6 Cir. 1963); Northcross v. Board of Education of City of Memphis, 333 F. 2d 661 (6 Cir. 1964); Board of Public Instruction of Duval County, Fla. v. Braxton, 326 F. 2d 616 (5 Cir. 1964).

[4] Judge Miller refused to strike the allegation in the complaint which raised the assignment of teachers issue, holding that "[I]t might become material and require consideration if the question is raised by proper parties, * * * [and] in order to avoid a multiplicity of suits, the court will retain jurisdiction of the case in order that the question may be raised if any proper party desires to intervene." Appellants seem to regard the foregoing to mean that only a teacher has standing to challenge discrimination in teacher assignments. We do not so regard the holding and are not persuaded that Judge Miller so intended. The Court was familiar with the cases cited, supra, which stand for the proposition that pupils may have standing to litigate the issue. Seemingly, the Court was of the view that appellants were prematurely attacking the assignment of teachers for the reason that Patricia Rogers and others of her class are high school students who are attending grades not yet reached in the orderly progress of the plan of integration. We are in accord. Certainly if there is in fact discrimination being practiced in teacher selection, pupils who are directly

affected thereby, or the teachers themselves should be willing to intervene and seek a judicial determination of the question.

Moreover, in view of the good faith efforts of the Board and other school authorities to bring about complete integration, we are persuaded to hold that they should be afforded the initial opportunity of correcting the practice of employing teachers on a proscribed discriminatory basis, if in fact that practice prevails. If the Board and other school authorities fail or refuse to recognize and discharge their responsibility in this regard, we are confident that the trial court on motion or application of proper parties will accord the question prompt and effective consideration and will enter such order as the facts and circumstances justify and require.

Attorney's fee issue.

[5] Finally, appellants contend that the Court's error in approving the revised plan extends to its denial of their motion for attorney's fees orally made at the conclusion of the trial. Applicable here is the general rule that the award of counsel fees lies within the sound discretion of the trial court, but like other judicial discretion, it is subject to review. Bell v. School Board of Powhatan County, Virginia, 321 F. 2d 494 (4 Cir. 1963).

[6] Judge Miller accorded the question due consideration, 232 F. Supp. pp. [126] 843-844, and concluded that the "facts * * * do not justify the allowance * * *," and denied the motion. We have examined the question in the perspective of all the surrounding circumstances and are thoroughly convinced that there is no valid reason for hold-

ing that the Court's action resulted from an abuse of its discretion. The Bell case, supra, has vital and decisive distinguishing features. There the Court was obviously motivated by the "long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education."

In summary, therefore, we are satisfied that the action of the school authorities in their desegregation efforts "constitutes good faith implementation of the governing constitutional principles." Accordingly, the judgment must be and is affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 17870

JANICE ROGERS, a Minor, Age 16, PATRICIA ROGERS, a Minor, Age 15, by Their Mother and Next Friend, Mrs. CORINE ROGERS,

Appellants,

vs.

DR. EDGAR F. PAUL, DR. ROGER BOST, JOHN M. YANTIS, BRUCE SHAW, JACK GROBER, DOUGLAS G. ROGERS, Board of Directors of Special School District of Fort Smith, Arkansas; CHRIS CORBIN, Superintendent of Schools of Special School District of Fort Smith, Arkansas; SPECIAL SCHOOL DISTRICT OF FORT SMITH, ARKANSAS, a Corporation.

APPEAL FROM the United States District Court for the Western District of Arkansas.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Arkansas and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

May 7, 1965.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 532

PATRICIA ROGERS, et al.,
Petitioners,

vs.

DR. EDGAR F. PAUL, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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STATEMENT OF THE CASE

An inquiry into the record in this case will readily reveal that there is no dispute or actually no room for dispute between the parties as to any legal principle involved. Further inquiry will inevitably lead to the conclusion that these respondents have not attempted to circumvent the requirements of the law in the matter of the integration of the school system of the respondent district, but to the contrary, have made a "prompt and reasonable start" as early as 1956 (R. 48) by adopting a

plan of desegregation. This plan provided for the desegregation of one grade each year commencing with the school term 1957-1958 in the first grade, one year at a time, until full integration should be accomplished. The plan continued progressively in that manner (R. 16-23, 48-49, 75-76).

Thereafter, in the opinion in the case of *Goss* v. *The Board of Education of the City of Knoxville, Tennessee,* 373 U.S. 683, this Court proscribed a voluntary transfer provision in a plan of desegregation substantially of the same terms as that included in the plan of the Special School District of Fort Smith. With reasonable dispatch the District revised its plan to eliminate the objectionable feature of voluntary transfer except as to a period of one year delay as to three predominately Negro elementary schools (R. 29-31, 40 and 58).

The revised plan operated to immediately integrate some three hundred Negro pupils into previously all white schools which was the integration of approximately one-third of all of the Negro pupils residing within the district (R. 63-64-66), and under the plan and as grades 9 through 12 will proceed to integrate, one each subsequent year after the school year 1964-65, there will and must necessarily be a geometrical increase in this integration of both white and Negro pupils in each successive school year. In fact, the enrollment records of the respondent district show that, under its plan approved by the courts below, of a total of 1,055 Negro pupils enrolled in all the district's schools in September, 1965, for the current 1965-66 school year, 844 (exactly four-fifths) are presently enrolled in and attending integrated schools in which white pupils are also presently enrolled, all in attendance in integrated classes.

This case (*Rogers* v. *Paul, et al.*, 232 F. Supp. 833, W. D. of Ark. 1964) was tried to the District Court, and the issues of fact were found in favor of the respondents. Upon review the case was affirmed by the Court of Appeals, Eighth Circuit (345 F.2d 117).

The District Court found that the School District, acting through its directors, had made a "prompt and reasonable start toward compliance with the Brown decision" and had proceeded with "all deliberate speed", 232 F. Supp. at page 840.

The Court of Appeals, in its opinion affirming the action of the District Court, said:

> "This determination is *factually* sound and was not induced by an erroneous concept of the controlling legal principles. The integration plan adopted by the local school board without compulsion, when evaluated in light of local conditions and administrative hurdles, convinces us that not only did the school board make a 'prompt and reasonable start toward full compliance', but that desegregation has in fact moved forward with 'all deliberate speed'." 345 F.2d at p. 122. (Emphasis supplied).

It is respondents' position that there are no issues in this case except factual issues, that is to say, the application of undisputed facts to accepted legal principles.

In the first instance, the directors of the Special School District of Fort Smith have been allowed to exercise their discretion in the adoption and application of a plan of desegregation. Thereafter, this plan and its good faith application was reviewed by the District Court, and that Court has exercised judicial discretion in determining the factual situation. Thereafter, the Court of Appeals has found the facts to be that the District Court correctly exercised its judicial discretion in determining

the factual situation, and the Court of Appeals has judicially found and determined that the facts support the respondents' position.

Petitioners are not now with this proceeding attempting to present any unique and unresolved legal question. To the contrary, petitioners seek only to have the facts reviewed by this Court.

ARGUMENT

I.

The Fort Smith Plan Is the Product of the Exercise of a Discretion by the Board of Directors Based upon Experience and Its Provisions Are Reasonable.

A. The pace of desegregation as reviewed by the District Court and affirmed by the Court of Appeals is not in conflict with standards established by this Court and the other Circuits.

There is no conflict between the decision below and the decisions of this Court and decisions of other Circuit Courts.

The petitioners took this same position in the Court of Appeals and urged the same authorities as cited in their present argument. These authorities were explored by the Court of Appeals (R. 40a, 41a; 345 F.2d at p. 123) and the opinion of the Court in each case was discussed by the Court of Appeals. No language could be clearer than that contained in the opinion (R. 40a; 345 F.2d at p. 122) where the Court said:

> "A cursory examination of these authorities reveals one unavoidable and most significant factual dissimilarity with the facts presented in this appeal. Among other important factual variances, every case involved situations where the school boards had either failed to act in good faith or after inordinate delays

had proposed a plan which was too slow and unduly protracted the process of desegregation. The courts were there confronted with proposed desegregation plans of the grade-a-year variety which were to commence from 5 to 10 years after the Supreme Court's first disposition of the Brown case in 1954."

When petitioners urge the universally recognized principle that good faith is not measured by "state of mind" but objectively by "required action" (Petitioners' Brief at page 15) they overlooked another equally well established guideline. This Court has recognized from the beginning that the duty and responsibility of compliance rests initially upon the shoulders of the directors and administrators of the school system. It remains only a factual question to be reviewed by the Court as to whether or not this duty and responsibility has been adequately undertaken and completed. The District Court inquired into the adequacy of the assumption and performance of this responsibility by the District. In affirming the action of the District Court, the Court of Appeals recognized that in fulfilling this responsibility the directors must competently cope with administrative problems and that they must make an adequate start toward full desegregation as based upon and in the face of the attendant local problems.

In other words, the District Court and the Court of Appeals have made a judicial determination of the facts which portray the administrative hurdles attendant upon the solution of the problem at the local level and in doing so reviewed the undisputed testimony relative to the number and significance of those hurdles attendant upon a fair and adequate solution. As stated by the Court of Appeals:

"But appellants argue further that there was no showing of valid administrative problems justifying

prolonging of complete desegregation for four additional years. We do not so read the record. Both appellants and appellees were satisfied to rely mainly on the testimony of the Superintendent of Schools of the Special School District of Fort Smith. His testimony in substance was that since the voluntary adoption of the desegregation plan in 1956, the Board has continuously been confronted with administrative problems arising out of: (a) school population growth and inadequacy of buildings and other facilities; (b) mass shifting within the District of School population from the older sections of Fort Smith to new suburban areas; (c) the huge building program entailing an expenditure of approximately $10,000,000; and (d) the transition of all of the schools into a regular 6-3-3 system. The Superintendent further stated that to require immediate desegregation of the four remaining grades would give rise to additional administrative problems and would greatly hamper what has to date been an orderly desegregation of the schools. That the Superintendent was qualified to express the foregoing opinion can hardly be gainsaid. He had been in the Fort Smith school system for 24 years as a principal, 4 years as assistant superintendent and 10 years as Superintendent. His uncontradicted testimony supports the conclusion that to compel immediate and complete integration would needlessly thwart the good faith efforts of the Board to accomplish de jure desegregation in a peaceful and orderly manner." (Petitioners' Brief at pages 39a, 40a; 345 F.2d at p. 122).

B. The record does not indicate that the Lincoln School provides grossly inferior education.

Again the petitioners seek with this proceeding to have a review by this Court of facts which have been judicially determined by the Court of Appeals. When the petitioners urge the "undeniably inferior Lincoln High School" (Petitioners' Brief at p. 17), they are urging upon this Court a question of fact which has been judicially determined adversely to this contention.

The facts with reference to this contention were thoroughly explored by the lower court and the following language appears in the opinion of the Court of Appeals:

"In support of their efforts to bring about full and immediate desegregation, appellants contend that Patricia Rogers and other Negro high school students similarly situated are subjected to an inferior as well as segregated education. More specifically, we are requested to direct the entry of an order permitting Patricia to transfer from Lincoln High School to Northside High School for the 1965-1966 school year in order that she may avail herself of an integrated education and be permitted to obtain instruction in journalism, music, and German, which are unavailable at Lincoln. In regard to the alleged inferior education available to Negro students, the Superintendent testified without contradiction that the Lincoln High School facilities have been regularly improved; and there exists an equal apportionment of teachers per pupil throughout the three high schools; that the per pupil operating cost for Lincoln was greater than the largest white high school; and that 'Lincoln High School has been accredited by the North Central Association since 1924, before that it was accredited by the Southern Association, and it meets fully the requirements of the students under requirements of the North Central Association for full accreditation.' Additionally, the Superintendent stated:

"'* * * you try to step up a curriculum based on the size and what the pupils request in the school. We have told all of our high schools, all three of them, that we would offer *any* course requested if there are as many as six students that want the course and we can find a teacher to teach it. Lincoln High School and Northside High School have been North Central accredited High Schools, the same length of time, I believe since 1924. The Southside High School is not accredited by the North Central Association at

the present time. Therefore the offerings in each school are based on what the students want in the school.'" (Petitioners' Brief at pages 42a-44a, 345 F.2d at pp. 123-4).

So, again this question raised by the petitioners here resolves itself into a predetermined question of fact.

C. The lower court's decision is not in conflict with the text of the Civil Rights Act of 1964 or the regulations for its administration.

It is urged by petitioners that this court should take jurisdiction of this case on the basis that petitioners believe that the Court of Appeals' decision frustrates enforcement of school desegregation as required by the Civil Rights Act of 1964 (42 U.S.C.A. Sec. 2000d).

We fail to see the adequacy and force of any argument that can be made on this score. Actually petitioners answer their own argument when they admit that the regulations under which the Civil Rights Act of 1964 are administered provide that:

> "* * * school boards are eligible for financial assistance if they are subject to a final court order of desegregation." (Petitioners' Brief at page 22).

So long as this is a regulation then it would appear that it is enforceable as a part of the body of the administrative law of the Civil Rights Act of 1964.

II.

The Question of the Assignment of Teachers Without Regard to Race Has Not Been Finally Litigated in This Case.

We refer to the language of the Court of Appeals on the question of the disposition of the issue of the desegregation of the teachers. It was recognized by the District

Court in the first instance and by the Court of Appeals that the desegregation of teachers is recognized as a part of the over-all desegregating process and that courts have been ordering districts to undertake teachers' integration as a part of the total job of desegregating the schools. Respondents do not take issue with this pronouncement; they readily agree and have always agreed that in order to fairly and completely integrate the school system and to thus bring to full fruition the purpose and intent of the decisions that the teachers must be employed without regard to race or color. Respondents recognize and have recognized that it would be a discrimination against the pupils who have been integrated to deny them the right to challenge faculty segregation.

The District Court considered this question but reserved it as a question that might become material and require consideration in a proper situation.

The Court of Appeals sanctioned and approved the District Court's action in retaining jurisdiction of this question until such time as the matter was litigated by students who are attending integrated classes, reached in the orderly progress of the plan of integration. None such were parties in this case.

The Court of Appeals states:

> "Seemingly, the Court was of the view that appellants were prematurely attacking the assignment of teachers for the reason that Patricia Rogers and others of her class are high school students who are attending grades not yet reached in the orderly progress of the plan of integration. We are in accord. Certainly if there is in fact discrimination being practiced in teacher selection, pupils who are directly affected thereby, or the teachers themselves should be willing to intervene and seek a judicial determination of the question.

"Moreover, in view of the good faith efforts of the Board and other school authorities to bring about complete integration, we are persuaded to hold that they should be afforded the initial opportunity of correcting the practice of employing teachers on a proscribed discriminatory basis, if in fact that practice prevails. If the Board and other school authorities fail or refuse to recognize and discharge their responsibility in this regard, we are confident that the trial court on motion or application of proper parties will accord the question prompt and effective consideration and will enter such order as the facts and circumstances justify and require." (Petitioners' Brief, page 46a; 345 F.2d 125).

We know of no decision, and our attention is not directed to any decision by petitioners, that takes issue with this position.

CONCLUSION

It is the position of the respondents that there are no unique questions of law which are raised by this record and remain undecided, nor any conflicts with prior decisions of this Court, nor decisions of Courts of Appeal of other Circuits upon similar facts, and for the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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